SUPREME COURT, U. S.

Argued by
HARRY BRODBAR

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IN THE

Supreme Court of the United States

October Term, 1968

No. 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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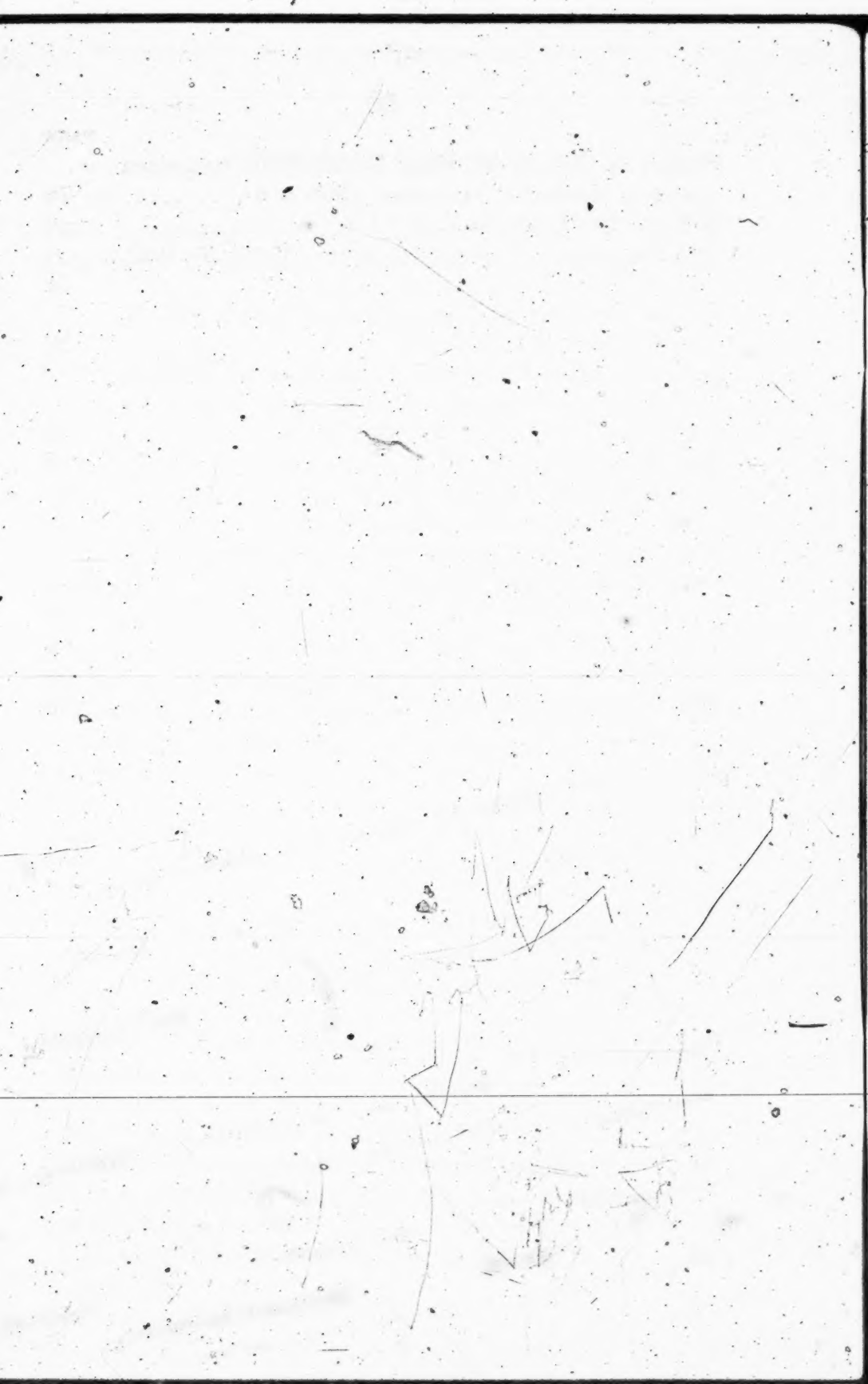

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

Statement

This is a direct appeal by the appellant from the order of the Court of Appeals of the State of New York, entered on July 7, 1967, affirming the order of the Appellate Term of the Supreme Court, Second Department, dated December 23, 1966, which affirmed the judgment of the Criminal Court of the City of New York, County of Kings, of August 9, 1966, convicting him of Malicious Mischief, sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, said statute making it a misdemeanor to "publicly mutilate, deface, defile, or defy, . . . or cast contempt [upon], either by words or act . . . the flag of the United States of America." The sentence was suspended.

Appellant appealed to this Court on August 30, 1967, and probable jurisdiction was noted on June 17, 1968. 36 U.S.L. WEEK 3483.

The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257 (2).

Opinion Below

The opinion of the Court of Appeals of the State of New York was handed down on July 7, 1967, and is reported in 20 NY 2d 231, 229 N.E. 2d 187. See appellant's Appendix, pp. 3a-10a, for text of opinion. No written opinion or memorandum was handed down by the Appellate Term of the Supreme Court of the State of New York, Second Department, or the Criminal Court of the City of New York, County of Kings.

Constitutional and Statutory Provisions Involved

Section 1425 of the Penal Law of the State of New York provides in its pertinent parts as follows:[1]

"16. Any person, who

a. . . .

b. . . .

c. . . .

---

[1] By L. 1965, c. 1031, Sec. 52, eff. Sep. 1, 1967, this statute has been superseded by Section 136 of the General Business Law of the State of New York in which the identical language is employed, except for a portion thereof not relevant herein. Since appellant has referred to the prior section in his brief, appellees will continue to do likewise with the understanding that the references are applicable to the more recent enactment.

See Appendix A-1, A-2 *infra* for copy of letter of Hon. Richard G. Denzer, Executive Director, NEW YORK STATE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, August 15, 1968, referring to the rationale for statute's transfer to the General Business Law.

d. *Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act . . .*

e. . . .

f. [proscribing still another act] . . . *the flag of the United States of America . . .*

g. . . .

Shall be deemed guilty of a misdemeanor; . . ."

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, *in any number of either thereof,* or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York.

"This subdivision shall not apply to any act expressly permitted by the statutes of the United States of America . . ." (Emphasis supplied.)

The first Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis supplied.)

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 8, of the Constitution of the State of New York reads as follows:

"*Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.* In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." (Emphasis supplied.)

Questions Presented

1. The appellant inquires whether New York's flag-desecration statute violates the basic tenets of the "void for vagueness" doctrine in that it (a) purports to sweep within its ambit conduct[2] which is clearly protected by the First

[2] Although appellant states that the record below is unclear whether his words or actions were the basis for his conviction (Brief for Appellant, p. 9, note 2; p. 18, note 6), the State shall endeavor to clearly demonstrate that the appellant was convicted for the deliberate physical act of desecrating the flag of the United States of America, in public, and that any oral statement attributed to him at the time he committed the physical act was not the ground for his conviction, but, rather served solely as support in resolving the presence of *intent* to desecrate the flag at the time it was set on fire.

and Fourteenth Amendments to the United States Constitution; (b) fails to afford adequate notice of the scope of its proscription; and (c) fails to provide adequate standards for its enforcement.

2. The appellant also poses the question: May the State of New York constitutionally impose penal sanctions upon one who is charged with publicly and deliberately desecrating an American flag as a means of dramatizing his dissatisfaction with social conditions existing within our Country?

Statement of the Case

The Trial

A. The People's Case

At the commencement of the trial, the appellant moved to dismiss the complaint upon the ground that the First Amendment to the United States Constitution, with regard to freedom of speech, protected his right to protest "in many forms, whether it be by *burning a flag*, demonstration or picketing," and that the appellant's act of burning the flag was a "form of demonstration and protest" (13a, emphasis supplied).[3] The appellant's motion to dismiss the complaint was also predicated on the premise that the applicable statute was in violation of the Supremacy Clause of the United States Constitution. This argument, too, was not acceptable to the trial court, and that motion was likewise denied (14a). A stipulation was entered into that the charges against the appellant, Malicious Mischief, and Disorderly Conduct, which had been set forth in two separate complaints, would be tried together, and that the facts adduced in one would be applied to the other "wherever necessary, and [that] there [would] be separate findings on the

[3] Numbers in parentheses refer to pages of appellant's Appendix.

facts and the law and separate judgments [would] be rendered'' (14a-15a).

Patrolman James Copeland, a New York City Police Officer, testified substantially as follows:

On June 6, 1966, at or about 7:00 P.M., he had occasion to be present at Lafayette Avenue and St. James Place, in the County of Kings, City and State of New York, where he saw a crowd collected at the corner (15a). There was a fire burning, and the officer got out of his car, and walked over toward the fire around which the crowd was standing (15a-16a). According to the officer, a large folded flag, which he recognized to be an American flag, was burning. After inquiring of the people in the crowd as to the identification of the person responsible for this, the officer walked over to the northwest side of Lafayette Avenue, on the other side of the street, where he saw the appellant standing and talking loudly (16a-17a). The appellant was motioning with his hands, and saying, ''We don't need no damn flag.'' The officer asked him if he burned the flag, to which the appellant answered, ''Yes; that is my flag; I burned it'', and, ''If they let that happen to Meredith[4] we don't need an American flag'' (17a). The officer then extinguished the fire, placed the appellant under arrest, and took him, and the remaining portion of the flag, to the precinct (17a). According to the officer, about 30 people, other than the appellant, were present at the scene, when the officer arrived, and by the time the arrest was made, about 35 to 40 people were in the group (17a). He had been 10 or 15 feet from the appellant when he began to understand what the latter was talking about (18a).

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[4]Referring to the unfortunate incident which occurred during a civil rights march when the noted civil rights Leader, James H. Meredith, was wounded by a snipers bullet near Hernando, Mississippi, on June 6,1966.

On cross examination, the officer testified that at the time of the incident he had been in a patrol car with another officer, who was not then present in court. That officer had been present during the entire incident, and the witness stated that if his partner were then in court he would substantiate the witness' testimony (18a). Prior to approaching the appellant, the officer parked his vehicle in front of the burning flag, on the northeast side of Lafayette Avenue and St. James Place. The appellant was then standing on the northwest corner (18a). There were people standing on all four corners, with about 30 persons on the northeast corner where the burning flag was, and 5 or 10 persons on the northwest corner where the appellant was then located (19a). When the witness left his patrol car, he began to stamp out the burning flag. The officer left the flag on the ground and went over to the appellant across the street to ask him if he burned it. Portions of the flag were picked up by the officer after the appellant was brought over to the patrol car (19a-20a). The time was then about 7:00 P.M. There was a subway entrance at the southeast corner, as well as a housing development and a church nearby (20a). Traffic was moving on Lafayette Avenue. No crowd overflowed to obstruct traffic, and not all of the persons who stopped to see what had happened continued to move on (20a). The wide sidewalk was not obstructed and persons were able to pass by. The crowd was not unruly (20a). According to the police officer, who claimed to be acquainted with the correct manner of folding an American flag, it was then folded with the stars and stripes facing upward. He did not know if the flag had been folded in the proper way because "it was burned quite badly" (21a). The flag had not been "on a newspaper or anything" (21a).

B. The Defense.

The appellant testified in his own behalf substantially as follows:

He was then employed as a bus driver by the New York City Transit Authority for 20 years, and was married. He had never appeared in a court before (21a). He had served honorably in the military service for a period of 5 years, in the Quartermaster Corps. He was a recipient of the Bronze Star (22a). On the day of the occurrence he had been in his apartment when he heard a news report that James Meredith had been shot. When he heard that he said, "They didn't protect him," and went to his dresser drawer and took out the American flag (22a). This 48-star flag had been given to his wife's mother and had draped the coffin at the funeral of his wife's stepfather. The flag was faded, about 20 years old, and had been displayed by him on National holidays (23a). He had a second flag with 50 stars. After hearing the broadcasted report about Meredith, he took the flag to St. James Place and Lafayette Avenue. There he placed a piece of newspaper on the ground, held the flag in his left hand, "struck a match and made a flame and I stood there and I held it as long as I could. When it began to burn my hand I dropped the flag" (23a). The patrol car then stopped, and the policeman asked him if he had set fire to the flag (23a-24a). He admitted that he had, and told the officer, "If they do what they had [sic] to Meredith we don't need this flag" (24a). No one else spoke to him, and he noticed no unusual crowd. The flag, which was still burning when the officer came, was on the curb. The appellant did not speak to anyone else but the police officer at the time (24a).

On cross examination, the appellant testified that the particular flag involved had been in the dresser drawer for at

least one year, and that he had displayed a new flag the previous Memorial Day (18). The flag in question had not been displayed after the new one was purchased. When asked when he had decided to burn the old flag, the appellant testified that the idea of doing so had come when the new one was purchased. However, he did burn it after he heard that James Meredith had been shot, although "not immediately." He had planned to burn the flag long before he "heard about Meredith" (25a).

At the conclusion of the trial, the appellant was acquitted of the charge of Disorderly Conduct, and found guilty of Malicious Mischief, in that he violated sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*, (25a), for which he received a suspended sentence.[5]

Summary of Argument

The statute in question, section 1425, subdivision 16, paragraph d, of the Penal Law of the State of New York, *supra*, designed to secure the peace and well-being of the inhabitants of the State, and to preserve the dignity of the Flag of the United States of America, the cherished "symbol that represents our heritage and our hopes,"[6] is not unconstitutional on its face and as applied because of any vagueness or overbroadness. Nor is it an unreasonable restraint of free expression of thoughts or ideas, notwith-

[5] Although the sentence minutes have not been made part of the appellant's Appendix, the Court is respectfully referred to the opinion of Chief Judge Stanley H. Fuld wherein reference is made to the trial court's determination. (Appellant's Appendix 10a.)

[6] Mr. Justice Frankfurter in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 662, 63 S. Ct. 1178, 1196 (1943) (dissenting opinion).

standing the fact that the statute forbids the use of "words", or deliberate "nonverbal" acts of desecrating the flag for which latter action he was arrested, tried and convicted, and by which performance he hoped to communicate his dissatisfaction with undesirable social conditions in our land in a more dramatic manner than afforded by other more traditional media of expression.

There is a serious necessity for the type of legislation now in issue, and this becomes more manifest in this critical period of our Nation's history, which counsel for appellees chooses to characterize as an "era of arrogance,"[7] because of the many forms of rebellious behavior which have come to bear upon our society and which are entirely dissociated from the limits of proper dissent.

It will be demonstrated that proscribing the appellant's intentional physical act of desecration, in public, is made essential by the legitimate state interests of averting the danger of breaches of the peace and thereby promoting the safety and proper functioning of a state within its self-governing borders, as well as preserving the "dignity of the Flag, the Flag that is the hope of the world and the Symbol of what perhaps is the last true democracy on the face of the earth, today."[8] The right to convey a message, particularly by dissentients, is made available and indeed encouraged through more proper and acceptable channels of communication other than by the offensive, disdainful and "incendiary" means of publicly and designedly de-

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[7] See pp. 72-73 *infra*.

[8] *People* v. *Picking*, Misc. , 23 N.Y.S. 2d 148, 149 N.Y.C. Mag. Ct. (1940), *aff'd*, 263 App. Div. 366 (First Dept. 1942), *aff'd*, 288 N.Y. 644, 42 N.E. 2d 741 (1942), *cert. denied*, 317 U.S. 632 (1942).

secrating the American flag by burning. The State of New York, in enforcing the pertinent statute, does not seek in any way whatever to censor or "chill" underlying concepts or views, which are government's most effective process for self-correction. Nor is there any aim to compel adherence to an exaggerated or super-patriotism on the part of its inhabitants.

Legitimate alternatives for expression are also ensured by New York State's own Article 1, Section 8, of its Constitution, *supra*. It will also be shown that the verbal language expressed by the appellant was not the *sine qua non* of his conviction. Its fortuitous presence served merely as a guide in assisting the trial court in the proper assessment of the appellant's state of mind at the time he set fire to "Old Glory," thereby obviating any dire possibility of a wrongful conviction, if indeed an innocently-conceived act was accidentally or inadvertently committed (see note 2 *supra* at 4). However, it is respectfully urged that even in cases not involving any physical acts whatever, but purely parol language fashioned to publicly profane this Nation's flag, the identical peril is present. "Desecrating" speech, too, cannot serve as a rational and salutory means for societal self-improvement through discussion, for its primary aim when so expressed with reckless, insurgent and inflammatory abandon, is to chip away at the very foundations of a democratic way of life. Thus, the need to repel dangerous, defiant, or refractory overtones dictates the exigency of protecting the safety and well-being of a free and orderly society, while simultaneously shielding a "rallying symbol" from abuses tending to threaten and, perhaps, obliterate the vital meaningfulness of a time-honored reminder of the ideals of our Nation and the better life it solemnly and perpetually promises to all.

These genuine concerns transcend individual liberties without unconstitutionally denigrating fundamental safeguards for only in the necessary infringement upon freedom of speech, in whatever form one may believe he is attaching symbolic significance, can all of us be assured that a greater good will be accomplished.

In sum, the thrust of the arguments of the State of New York is that the statute does not proscribe orthodox conduct and leaves inviolate free and fearless discussion of public issues, even by way of criticising the shortcomings of our Government, so that needful changes may be enhanced.

The statute does *not* mandate *affirmative* acts of respect for the flag, and the State, in its fundamental right of self-preservation, may pursue the exercise of its police power in a legitimate manner. In so doing, cherished liberties secured to each of us by our Founding Fathers may properly be required to yield to the greater need for a society in which peace, good order and tranquility will not be subjected to possible endangerment, or its security threatened.

The act for which the appellant was arrested and convicted cannot be condoned because it endangers the structure of duly constituted government, and prohibits in clear, precise, and unequivocal language, intentional, wilful, not accidental or inadvertent, public acts and language which cast dishonor upon an emblem of our sovereignty for which Americans have lived and died from the earliest days of the Republic. And in interdicting the use of "words or acts," in which the aforementioned dangers may find expression, the State, in protecting itself as well as the Nation, has not, by this clear and narrowly drawn statute, created any difficulty for anyone in comprehending just what will bring him within the ambit of its proscription.

ARGUMENTS

A.

The statute clearly and precisely delineates the boundaries of its proscription and since protected conduct cannot be swept within its ambit, any contentions that it suffers from vagueness and impermissible overbreadth are untenable.

Section 1425, subdivision 16, paragraph d, of the Penal Law of the State of New York, *supra*, by its very language clearly prohibits only the *intentional and wilful*, rather than accidental or inadvertent, physical acts, or utterances, which are designed to defile the flag. Subdivision 16, paragraph d, of the statute, *supra*, employs the descriptive language "mutilate", "deface", "defile", "defy", "trample upon", and "cast contempt", each of which have well-defined dictionary meanings and manifestly evince *a mental attitude* on the part of the perpetrator to do an act which has for its undoubted purpose the desire to desecrate the flag. It now becomes necessary to parse the statute in order to learn its meaning. Webster's New International Dictionary (Unabridged, 2nd ed., 1952) sets forth the following definitions:

- To *mutilate* is "to maim; cripple; hack; . . . [t]o destroy or remove a material part of, so as to render imperfect." (*Id.* at 1617.)

- To *deface* is "[t]o destroy or mar the face of or external appearance." (*Id.* at 686.)

- To *defile* is "to crush, outrage . . . [t]o make filthy; to dirty; befoul; to corrupt the purity or perfection of; to debase . . . [t]o sully; to tarnish . . .; to dishonor. (*Id.* at 688.)

- To *defy* is "[t]o renounce or dissolve all bonds of affiance, faith or obligation with; to reject, repudiate, or renounce . . . [t]o declare war against; to challenge to combat . . . [t]o despise; disdain . . . . [t]o set at naught." (*Id.* at 689.)

- To *trample upon* is "to tread heavily so as to bruise, crush, or injure; . . . . to inflict injury or destruction; to make encroachments in a contemptuous and ruthless fashion." (*Id.* at 2688.)

- To cast *contempt* is the "[a]ct of contemning, or despising; the feeling with which one regards that which is esteemed mean, vile, or worthless; disdain; scorn . . . . derision, contumely." (*Id.* at 575.)

It is beyond cavil that the words of the statute hereinabove defined are words which spell out design, and are words entirely unrelated to accidental or inadvertent occurrences. They are of such tenor that it becomes most difficult to envision any misinterpretation that can be possibly made by an observer, particularly a police officer, so that an innocent person might be swept within the boundaries of the statute's proscription. Whereas one may have contempt for a person or thing, and such contempt finds repose in the recesses of one's mind, acts of "publicly *mutilat*[*ing*], *defac*[*ing*], *defil*[*ing*], *defy*[*ing*], *trampl*[*ing*] *upon* or *casting contempt* upon either by words or act . . . . the flag of the United States of America" (emphasis supplied), are by the very nature of things, *decisive* performances which the actor must express overtly since it becomes clear that he no longer can contain himself and be satisfied with just having a reticent mental attitude. Since the aforementioned words of the instant statute import a state of mind, the overt public expression of such an attitude, whether "by words or act," leaves residues of easily recog-

nized qualities and abundant evidence of motivation from which accurate and facile judgments by others can be made that at the time the statute was offended the intent to do so was present. Thus, both the perpetrator and the observer, are simultaneously made aware that the American flag has been impugned, and questions of guilt or innocence are not left within the realm of conjecture or imponderables. There will be no danger that the conduct will be judged *solely* by the eyes of the beholder; the actor himself, as gleaned from the words of the statute, will create the atmosphere from which his culpability will be easily discerned and with minimal effort.

Thus, since the agent by his overt manner intends to convey a "message of contempt," the ill-feeling which cannot remain concealed, will result in no misinterpretation as is likely when an act or statement is born of inadvertence or accident. His very deportment at the time of the desecration, even without one word being spoken, proclaims the contempt which the statute seeks to forbid. What satisfaction can be gained by the desecrator if his malevolent purpose fails to signal impressions which will be comprehended by the audience he seeks to reach? No more than could have Alexandre Dumas' legendary hero, the Count of Monte Cristo, if, as a solitary figure incarcerated in the Château D'If,[9] he frantically sought to hold up to scorn the inequities of his enemies and found no one within the reach of hearing to importune with his plaints. Silence and unobtrusive behavior are certainly not the implements of one who publicly desecrates the American flag for the reasons which prompt him in committing such a condemnable act must in-

[9] Collier's Encyclopedia, 1967, Vol. 8, p. 418, col. 2; p. 419, col. 1 (Alexandre Dumas *pere*).

deed be very strong. The circumstances surrounding the physical act, or, if there be no act, pure language employed, leave no doubt whatever to onlookers what was intended, and what the incited and disrespectful consequences will be. He most certainly will display anger on his face which will act as a guide in determining the intent to do a wrongful act.

Although the particular portion of the statute in issue refers to the disjunctive "or," immediately preceding the words "cast contempt," it becomes crystal clear from the foregoing that the Legislature had intended to employ the conjunctive "and," since all of the proscribed acts set forth in paragraph 16, subdivision d, of the statute, *supra,* are described by words having related meanings,[10] and are all words bringing to the fore, "by words or act," similar mental attitudes to degrade the American flag. If any doubts are to be expressed with regard to the clarity of any of the words preceding the language "or cast contempt," it is respectfully submitted that the wordage "or cast contempt" is of such meaningfulness that its purport at the time of its insertion into the statute many years ago was to give each of the other words an interpretation compatible with the statute's design to punish the *deliberate* degrading of the flag. The ancient maxim, *qui haeret in littera, haeret in cortice,* takes on particular significance here, for the law, in recognizing the ductility of words, will not adhere to the letter of a statute if in doing so its general purpose and policy becomes nullified, rather than promoted. (See *Riggs v. Palmer,* 115 N.Y. 506, 510, 22 N.E. 188, 189 [1889]; *Department of Welfare of the City of New York v. Siebel,* 6 N Y 2d 536, 545, 161 N.E. 2d 1, 6 [1959], *appeal dismissed,* 361 U.S. 535, 80 S. Ct. 586 [1960].) In the latter case, the

[10] See pp. 13-14 *supra.*

New York Court of Appeals substituted "and" for "or," in order to carry out the intended meaning of the statute in issue. It is noteworthy that Federal legislation covering flag desecration which was passed by the House of Representatives in 1967, and which passed the Senate on June 24, 1968, following an amendment which added the word "knowingly," reads in its pertinent parts as follows:

> "Whoever knowingly *casts contempt upon any flag of the United States by* publicly mutilating, defacing, defiling, burning or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both".[11] (Emphasis supplied.)

It is the State's contention that the permissible substitution of the conjunctive "and" in place of the disjunctive "or," in the New York statute immediately before the language "cast contempt," in effect makes the words "cast contempt" the dominant and key language which serves to render intelligible the other acts designated therein. The format of the Federal enactment, *i.e.*, "mutilating, defacing, defiling, burning or trampling upon", *supra*, clearly indicates that these descriptive words are merely illustrative of "casts contempt", the latter, it is reiterated, being defined, in part, as a "*feeling*" with which one regards that which is esteemed mean, vile, or worthless." Webster's New International Dictionary (Unabridged, 2nd ed. 1952), *supra*, (emphasis supplied). The word "esteem" is also construed as "regard," a word which implies "perception" or "recog-

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[11] The federal legislation sponsored by Congressman Byron G. Rogers, First District Colorado, is the result of Hearings before Sub-Committee No. 4 of the Committee of the Judiciary, House of Representatives, 90th Congress, 1st Session, 1967. (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700, subsec. [c]). This new act was signed into law by President Johnson on July 5, 1968.

nition," language, also, which unequivocally connotes a mental awareness or consciousness, not accidental or unintentional. The New York statute, likewise, is clearly defined notwithstanding the transposition of words which in no wise fails to convey the true meaning intended and the uncomplicated recognition which arises when a person means to shame and dishonor the object of his maleficence—the American flag.

Although the Federal enactment contains the word "knowingly," it is repectfully submitted that since the words employed in that statute makes obvious that the desecration must be intentional and wilful, the inclusion of "knowingly" becomes mere surplusage, and was no doubt inserted expediently in order to obviate any possible and baseless claim that the statute is vague. An essential ingredient in the word "knowingly," is some blameworthy condition of mind. It is inescapable that the word refers to what is characterized in the criminal law as *mens rea*. The import of the language of the statute, "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" are sufficiently clear, it is reiterated, to bespeak of an attitude of mind so that words such as "knowingly," "intentionally," or their adverbial equivalents, are not actually required to elucidate that which was obviously intended at the time the Legislature promulgated the desirable legislation. At times, even the absence of the word "knowingly," or its equivalents, in a statute, has been held not to be conclusive, and whether words are deemed to express an intent or guilty knowledge becomes a matter of construction "by considering the subject matter of the statute, *the language of the act*, the evil sought to be eradicated or prevented, and the consequences of the several constructions to which the statute may be susceptible." (*State* v. *Laundy*, 103 Ore.

443, 500, 204 P. 958, 977 [1922] [emphasis supplied].) Certainly, by considering the language of the act now before this Court, the words by their common usage can be considered as expressing a guilty knowledge or intent. Courts are "slow to find a legislative intent to condemn a man for not knowing that which he cannot know." (*People* v. *Rice*, 161 Mich. 657, 664, 126 N.W. 981, 984 [1910].) The danger, therefore, for rash judgment which might wrongfully convict, is nil.

In *Dennis* v. *United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862 (1951), this Court referred to words such as "knowingly," "maliciously," "wilfully," or "combinations or permutations of these and synonymous terms," and acknowledged that the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Similarly, in *American Communications Association* v. *Douds*, 339 U.S. 382, 411, 70 S. Ct. 674, 690 (1950), Mr. Chief Justice Vinson, speaking for the majority, aptly stated:

> "[T]he state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which in ordinary experience, mental condition may be inferred."

Since the flag desecrator will wish to display obvious signals of his feelings when the "words or act" portraying his contempt are ignited and brought to the fore, he will not allow himself to be frustrated in attaining his aim. Thus,

the statute cannot be criticized since it gives clear notice of what is proscribed, and contains nothing with which to ensnare the innocent. In *Beauharnais* v. *Illinois*, 343 U.S. 250, 264, 72 S.Ct. 725, 734 (1952), such words as virtue, *derision*, *obloquy*, depravity, and *contempt*, found in the Illinois group libel statute, were approved by this Court as clear and concise, against claims of vagueness. It is to be noted that the words herein emphasized are synonyms of some of the words in the statute now before this Court.

It is significant that Chief Judge Fuld in speaking for a unanimous court begins by stating, "We are called upon to decide whether the *deliberate* act of burning the American flag in public as a 'protest' may be punished as a crime." (*People* v. *Street*, 20 NY 2d [1967], *supra* at 234, 229 N.E. 2d at 189, appellant's Appendix 4a; emphasis supplied.) Later in the opinion, reference is made to the statute's purpose as discouraging "*contemptuous* and *insulting* treatment of the flag in public."[12] (*Id.* at 236, 229 N.E. 2d at 190, appellant's Appendix 8a; emphasis supplied.) And in narrowing the issue before it the New York Court of Appeals aptly states, "We need not at this time concern ourselves with a display of the flag in a manner which clearly does not manifest an *intention* to desecrate it." (*Id.* at 237, 229 N.E. 2d at 191, appellant's Appendix 9a; emphasis supplied.)

Thus, the New York Court of Appeals has recognized the meanings of the words in the instant statute "mutilate,

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[12]Webster's New International Dictionary (Unabridged, 2nd ed., 1952), *supra*, defines the following:

Contemptuous—"Manifesting, feeling or expressing contempt or disdain . . . *Syn.*—Haughty, insolent, supercilious, contumelious." (*Id.* at 575.)

Insulting—"Containing, or characterized by insult or indignity . . . *Syn.*—Insolent, offensive." (*Id.* at 1289.)

deface, defile or defy, trample upon, or cast contempt upon," by interpreting them as inherently representing a state of mind, an intention to do what the statute seeks to proscribe.

In *People* v. *Finkelstein*, 9 N.Y. 2d 342, 174 N.E. 2d 470 (1961), the same court, by a majority, in interpreting the then existing section 1141 of the Penal Law of the State of New York, regarding obscene material, read into the statute the requirement of "scienter," because of the "strong constitutional presumption attending legislative enactments [citing cases] that the statute was not intended to unreasonably restrict or inhibit our inalienable 'liberty' protected by due process . . . [A] mere omission of the word *'scienter'* need not be construed as an attempt to eliminate that common-law element of the crime. (See *Morrissette* v. *United States*, 342 U.S. 246 . . .)" (*Id.* at 344-45, 174 N.E. 2d at 471; emphasis in original.) And in *Winters* v. *New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1948), this Court pointed out that in *Fox* v. *Washington*, 236 U.S. 273, 277, 35 S. Ct. 383, 384 (1915), it had affirmed "a conviction under the stated limitation of meaning." This Court also stated in *Winters, supra,* that the *construction* by the New York Court of Appeals "puts these words in the statute as definitely as if it had been so amended by the legislature." (*Winters* v. *New York*, 333 U.S., *supra* at 514, 68 S. Ct. at 669).

Such an interpretation, which unlike the statute in *Finkelstein, supra,* is not required to be made here because the words contained therein are more susceptible to understanding, and are actually of a nature *res ipsa loquitur.* Thus, no argument would be tenable which would have for its postulate the assertion that the appellant herein was

prosecuted under any *ex post facto* law[13] since the New York Court of Appeals did not legislate words such as "knowingly," "intentionally," or equivalent terminology into the flag desecration statute, but, rather, accorded the language the sense which was already openly expressed within.

Thus, the manifest understanding by the New York Court of Appeals below, albeit expressed in somewhat indirect language,[14] is that intent be present in order to justify a conviction for flag desecration, and this interpretation, it is respectfuly submitted, becomes binding upon this Court. (See *Hebert* v. *Louisiana*, 272 U.S. 312, 317, 47 S. Ct. 103, 104 [1926]; *Skirotes* v. *Florida*, 313 U.S. 69, 79, 61 S. Ct. 924, 930 [1941]; *Winters* v. *New York*, 333 U.S. 507 [1948], *supra* at 514, 68 S. Ct. at 665, 669; *Adderley* v. *Florida*, 385 U.S. 39, 46, 87 S. Ct. 242, 247 [1966].)

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[13] Such an argument was advanced in the New York Court of Appeals by the defendants in the second *Finkelstein* case (11 N.Y. 2d 300 [1962]) following reversal, and the determination by the court's majority that "[a]lthough they can be charged 'with knowledge of the scope of subsequent interpretation' (*Winters* v. *New York* . . .), we still feel that new trials are warranted by the circumstances and in the interests of justice, so that although the People have the burden of proof, defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious material in their possession for sale." 9 N.Y. 2d (1961), *supra* at 347-48, 174 N.E. 2d at 472. The rationale was that since the defendants had no reason to believe that *scienter* was required, they no doubt did not take the witness stand to assert what might be deemed a futile defense of lack of knowledge. Compare *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215 (1959) in which the trial and appellate courts construed an ordinance as creating absolute criminal liability for mere possession of a book later judicially determined to be obscene, even though he had no knowledge as to the nature of its contents. This Court was constrained to reverse the judgment of conviction.

In any event, the appellant herein apparently understood what the statute required—wilfulness to desecrate—for the tenor of his defense was one of exculpation (24a-25a).

[14] See p. 20 *supra*.

That the statute requires a purposeful attitude to dishonor the flag has been recognized in other jurisdictions. In *State* v. *Schlueter*, 127 N.J.L. 496, 499, 23 A. 2d 249, 250-51 (Sup. Ct., New Jersey 1941), the court, in affirming a self-confessed Nazi's conviction for tearing a small American flag and throwing it to the ground, stated:

> "We understand that the statute, in making it a misdemeanor to deface or to defile the flag, used those words in their meaning of 'dishonor'. 'Dishonor' is *purposeful. The word implies a lively sense of shaming or an equivalent acquiscent callousness.* For illustration: a blind man stumbles over the flag and, not knowing what it is, walks upon it and then casts it aside. Has he 'trampled' upon the flag? Has he 'defaced' or 'defiled' it? Has he 'dishonored' it? We think not; because those words carry with them, by inherent meaning, an attitude of mind . . ." (Case, J.) (Emphasis supplied.)

This purposefulness and "lively sense of shaming" is determined by the atmosphere surrounding the dishonor, and in the context in which the "words or act" occurred.

Similarly, in *Hinton* v. *State*, 223 Ga. 174, 177, 154 S.E. 2d 246, 249 (1967), the court held that "it was not error, in the absence of a proper request, to fail to define in the charge to the jury the terms in such statutes [dealing with the mutilation and defacement of national and state flags] *which needed no definition to be understood by the jury.*" (Emphasis supplied.)

Appellant's reliance on *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S. Ct. 1316 (1964), is inappropriate. (See Brief for Appellant, p. 9.) The "range of activities" referred to in *Baggett, supra* at 371, 84 S. Ct. at 1322, which might be con-

sidered disrespect following the taking of oaths by teachers, said oaths designed to combat subversive conduct, cannot be equated with "words or act[s]" (sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*) aimed at desecrating our flag. Although Mr. Justice White, in *Baggett, supra,* conjectures that within the "range of activities . . . . [e]ven criticism of the design or color scheme of . . . flag or unfavorable comparison of it with that of a . . . foreign country could be deemed disrespectful and therefore violative of the oath" (*id.* at 371, 84 S. Ct. at 1322), it must be emphasized again that "criticism" or "unfavorable comparison" do not, per se, establish any mental attitude, favorable or unfavorable, without additional signs, which only a "*lively* sense of shaming" (*State* v. *Schlueter,* 127 N.J.L. 496, 499, 23 A. 2d 249, 250-51, *supra;* emphasis supplied), makes available. Innocuous-appearing conduct, by "words or act," will not lead to retaliation.

Only casuistry can make vague and nebulous what is truly intelligible and without the realm of ambiguity. And the appellant is not accurate when he states that one is not required to " 'gamble' on whether his form of expression is or is not permitted". (Brief for Appellant, p. 14.)

In *United States* v. *Wurzbach,* 280 U.S. 396, 399, 50 S. Ct. 167, 169 (1930), Mr. Justice Holmes aptly stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U.S. 373."

Again, in *Roth* v. *United States*, 354 U.S. 476, 491-92, 77 S. Ct. 1304, 1312-13 (1957), Mr. Justice Brennan reiterated the identical legal proposition as follows:

> "This Court . . . has consistently held that a lack of precision is not in itself offensive to the requirements of due process. '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' *United States* v. *Petrillo*, 332 U.S. 1, 7-8 [1947]. [The words used must] give adequate warning of the conduct proscribed and mark' . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense."

The "risk," or "gamble" on whether a form of expression will be required to yield to the public weal, and upon which the appellant has placed great concern (Brief for Appellant, p. 14), although, it is respectfully reiterated, does not actually pose any significant problem whatever because of the clarity of the words employed in the statute, was also given considered interpretation by Mr. Justice Frankfurter when he tersely enunciated in a dissenting opinion in *Winters* v. *New York*, 333 U.S. 507, 68 S. Ct. 665 (1948), *supra*:

> "What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be caught unaware? How easy ~~it is~~ to be explicitly

particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative draftsmen. Answers to these questions are not be to found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about 'indefiniteness.' (*Id* at 525-26, 68 S. Ct. at 675.)

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"[A] man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard: 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death'. *Nash* v. *United States,* 229 U.S. 373, 377. (*Id.* at 535, 68 S. Ct. at 679.)

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"The Court has been led into error, if I may respectfully suggest, by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. But diversity in result for similar conduct in different trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility they do not deprive persons of due process of law. (*Id.* at 535, 68 S. Ct. at 679.)

> "In considering whether New York has struck an allowable balance between its right to legislate in a field that is so closely related to the basic function of government, and the duty to protect the innocent from being punished for crossing the line of wrongdoing without awareness, it is relevant to note that this legislation has been upheld as putting law-abiding people on sufficient notice, by a court that has been astutely alert to the hazards of vaguely phrased penal laws and zealously protective of individual rights against 'indefiniteness.' See, e.g., *People* v. *Phyfe*, 136 N.Y. 554, 32 N.E. 978; *People* v. *Briggs*, 193 N.Y. 457, 86 N.E. 522; *People* v. *Shakun*, 254 N.Y. 107, 167 N.E. 187; *People* v. *Grogan*, 260 N.Y. 138, 183 N.E. 273." (*Id.* at 535-36, 68 S. Ct. at 680.)"

Accord, Roth v. *United States*, 354 U.S. 476 [1957], *supra*, note 30 at 492, 77 S. Ct. 1304, 1313, wherein Mr. Justice Brennan stated in the majority opinion:

> "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Cf. Dunlop* v. *United States*, 165 U.S. 486, 499-500."

"Risk" and "gamble" are obviated when one begins to realize "that the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 499, 55 S. Ct. 241, 256 (1935), (Cardozo, J., dissenting).

That police officers may, in rare instances, mistakenly chance to translate innocuous "words or act[s]," as dis-

plays of flag desecration, albeit the statute's clarity is beyond impediment, creates no greater basis for impugning that which legislators deemed expedient to enact so many years ago.[15] All that can be required is that a police officer act in good faith.

> "We will not demand of the officer that he weigh the circumstances confronting him with the detachment and precision of a laboratory technician . . . No more is required of him than that he act with the prudence and reason demanded of any responsible official in the conduct of his duties, in the light of surrounding circumstances." (*People* v. *Zeigler*, 358 Mich. 355, 373, 100 N.W. 2d 456, 467 [1960] (Smith, J., dissenting).)

Nor is the peril within the realm of probability that the passerby, other than one detailed to ferret out wrongdoers, to whom the law has referred as the average person, as indeed he is, will define innocent acts involving the American flag as those which will tend to incite him to violence. For the revered Mr. Justice Holmes in discussing intentional wrongs recognized that "even a dog distinguishes between being stumbled over and being kicked". Holmes, *The Common Law* 3 (1881).

The clarity of the language of the instant statute being without doubt will not bring into play any considerations whether statutory presumptions are now to be resorted to in order to define the lines of the law. Thus, no statutory presumption will be permitted to plague this Court and, perchance, risk the danger of its condemnation as "a means of an escape from constitutional restrictions". (Compare *Bailey* v. *Alabama*, 219 U.S. 219, 239, 31 S. Ct. 145, 151 [1911] [Hughes, J.].)

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[15] New York's statute was derived from Chap. 272, Sec. 1, of Laws of 1903.

Statutory language, though seemingly capable of varied mental manipulations, finds greater meaning in its application. It cannot be gainsaid that many words in our language, the meanings of which are far less clear than are words as "mutilate, deface, defile, . . . defy, trample upon, or cast contempt upon," throw off their veils of ambiguity when their applications in our everyday experiences affect our senses. It is undeniable that notwithstanding the premise that those less versed in language may have greater obstacles to overcome in the path of understanding, somehow all rational people, again made up of "average" persons, walk through the same doorway of comprehension when language comes to life.

No one can deny that such expressions as "hard-core pornography" (*People* v. *Richmond County News*, 9 N.Y. 2d 578, 175 N.E. 2d 681 [1961]); "predominant appeal to prurient interest;" "shameful or morbid interest in nudity, sex, or excretion;" "goes substantially beyond customary limits of candor in description or representation of such matters," (*Roth* v. *United States*, 354 U.S. 476 [1957]), *supra*, note 20 at 487, 77 S. Ct. 1304, 1310); "patent offensiveness" (*Manual Enterprises Inc.* v. *Day*, 370 U.S. 478, 486, 82 S. Ct. 1432, 1436 [1962]), and a host of others, have even hazier meanings than the simple words found in section 1425, paragraph 16, subdivision d, of the Penal Law of the State of New York, *supra*. Yet they have never been denigrated by this Court for reasons of vagueness. Much can be said for Mr. Justice Stewart's apt statement in *Jacobellis* v. *Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964), when in discussing the application of the test of "hard-core pornography" he stated:

> "It is possible to read the Court's opinion in *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, in

a variety of ways. *In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable.* I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that *under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it*, and the motion picture involved in this case is not that. (Emphasis supplied.)

And so shall deliberate flag desecration be recognized when it occurs for one will "know it when [he] sees it". The events giving rise to the offense cannot but represent dramatically, and in a culpable fashion, an innervated state of mind to do dishonor to that which the statute attempts to shield. The brisk words of the subject statute are neither "vague and fluid," nor "a trap for the innocent as the ancient laws of Caligula." (Compare *United States* v. *Cardiff*, 344 U.S. 174, 176, 73 S. Ct. 189, 190 [1952] [Douglas, J.]).

The phrase "unreasonable manner" found in a state's disorderly conduct statute, was ruled sufficiently clear to give adequate warning of what the statute was designed to interdict. According to the court, the term "merely articulates the standard of judgment which would be applicable even in its absence." (*United States* v. *Woodward*, 376 F. 2d 136, 141 [7th Cir. 1967] [Swygert, J.])

The appellant's claims of vagueness and overbroadness are such vital issues in the determination of this appeal that

the State of New York becomes impelled to amplify its discussion and analysis of the principles of constitutional interpretation in these fields. For the State of New York is cognizant, particularly in these critical times in the development of our democratic institutions, that a statute imbued with the salutary aim of preserving the dignity of this Nation's flag, even over and above any immediate considerations of possible risk of breaches of the public peace which may be occasioned by such inflammatory behavior, becomes one of paramount importance.

Mr. Justice Frankfurter, too, cautioned that the laws are not necessarily recondite and esoteric manipulations of language, to be resorted to in order to thwart legislative purposes. And as he so well elucidated:

> "Like others, judges too listen with what psychologists used to call the apperception mass, which I take means in plain English that one listens with what is already in his head. One . . . caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.
>
> "We must, no doubt, accord the words the sense in which [the legislature] used them. That is the only way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. . . .
>
> "And so we assume that [the legislature] uses common words in their popular meaning, as used in the common speech of men. The cases speak of the 'meaning of common understanding,' 'the normal and spontaneous meaning of language,' 'the common and appropriate use,' 'the natural, straightforward

and literal sense,' and similar variants." (Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 [1947].)[16]

If the instant statute had been so constituted as to forbid "dropping," "creasing," "wrinkling," or "discoloring," the American flag, words which do not inherently signify an insolent attitude of mind, but are equally construable as inadvertent or otherwise innocent occurrences, contentions of vagueness and "blurred signposts to criminality" (compare *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 142, 68 S. Ct. 1349. 1367 [1948], might very well be deserving of serious consideration by this Court. But these words as hereinabove illustrated are unlike those actually found in the statute since the Legislature was wise to embrace only language denoting comportment indisputably fused with spiteful design to inflict injury upon an object sought to be protected, and which behavior could in no wise be misconstrued by any onlooker. A multitude of types of conduct was not inserted into the statute, and the language actually selected narrows the scope of the offense, and vouchsafes its lucidity.

And thus in its clarity, the public, and particularly those charged with law enforcement, are concisely apprised of the behavior and language which the statute seeks to prohibit, and creates clear guidelines for the prevention of breaches of the public peace, and disrespect for what Dr. Oliver Wendell Holmes, Sr. called an "emblem of justice." Since the wording of the subject statute does not becloud the sanctions inherent therein, there is no violation of the due process clause of the Fourteenth Amendment. (Compare

[16] From the Sixth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York March 18, 1947.

Giacco v. *Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520-21 [1966].) Risks of prior restraint and censorship are not evident from the clear language of the statute. Nor is there any imminence that there will be a suppression in the conveyance of ideas. The statute, narrowly drawn, does not leave in an unreasonable and discriminatory fashion the determination as to what "words or act" will violate its terms. (Compare *Lovell* v. *Griffin*, 303 U.S. 444, 58 S. Ct. 666 [1938]. *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S. Ct. 900 [1940]; *Saia* v. *New York*, 334 U.S. 558, 559-60, 68 S. Ct. 1148, 1149-50 [1948]; *but cf. Kovacs* v. *Cooper*, 336 U.S. 77, 82-83, 69 S. Ct. 448, 451 [1949].)

The paucity of prosecutions involving flag desecration cannot be ignored, and has, it is respectfully submitted, a telling effect upon the appellant's concern that statutes of this nature may result in the hazard of unreasonable and discriminatory application.[17]

And the cases referred to by the appellant (Brief for Appellant, p. 12; n. 4 at 13) as within "[t]he broad range of conduct to which the statute has been applied in New York," are those which in the light of all the circumstances, tend to depict strongly the presence of contempt in the treatment of the American flag, although in *People* v. *Place* (Brief for Appellant, p. 13), extenuating circumstances may have prompted the prosecutor to move for a dismissal of the charge. The flag, in *Place, supra*, had been used in a play as

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[17] Chief Judge Fuld in the court below, points out that "[h]appily the courts have not been called upon to apply the statute, or others like it, with any degree of frequency." (Appellant's Appendix 8a).

Attorney General Ramsey Clark refers to today's flag desecrators as "infinitesimal" in number. (Hearings Before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 90th Congress, 1st Session [Serial No. 4], p. 120.)

a "prop." In *People* v. *Radich*, 53 Misc. 2d 717, 279 N.Y.S. 2d 680 (1967), *aff'd w/o opinion*, Misc. 2d , N.Y.S. 2d (1968), leave to appeal to New York Court of Appeals granted, N Y 2d (1968), the flag was used in a lewd manner which the defendant claimed to be a form of "protest art," in order to give vent to his feeling concerning the Vietnam issue. Can such obnoxious and malefic conduct ever leave any reasonable doubt as to the sentiment intended by the perpetrator with regard to the United States flag? (For pictures of this "art," see reference in Life Magazine, note 40 at 74 *infra*.)

The appellant attempts to strengthen his claim that the statute is vague and overbroad by noting instances wherein statements "would be vulnerable to prosecution under the statute" (Brief for Appellant, pp. 8-9). Yet such suggested statements are not difficult to interpret if we accept the notion, as has been advanced in detail by the State of New York, that any statements involving public issues which tend to encourage the constructive processes of self-government when political discussion remains unhampered, will invariably not be mistaken for desecration. Of course, the calumnious reference to the flag as "a damn flag" will not obfuscate the contrary impression that will be made, and will effectively stimulate resentment on the part of the listener. In *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574, 62 S. Ct. 766, 770 (1942), this Court concluded that "*damned* racketeer" and "*damned* Fascist" [were] epithets likely to provoke the average person to retaliation. . ." (Emphasis supplied.)

The requirement of prominently displaying an American flag at "[a]ll assemblies, warranted by law, held in any of the streets of the city, where public discussions are held"

(section 435-8.0(a), New York City Administrative Code), does not magnify the danger that First Amendment freedoms will become stifled because law enforcement officials may construe any "given speech as one which 'casts contempt' upon or 'defies' the displayed American flag." (Brief for Appellant, p. 8.) To reiterate, the dearth of cases involving arrests and prosecutions for flag desecrations, in the many states with similar legislation, simply because of the presence of the flag at public gatherings, whether indoors or outdoors, where orators have often spewed contempt for our Country, is indeed enlightening in weighing the peril which appears to be giving the appellant such grave, and undue concern.

In *Scales* v. *United States*, 367 U.S. 203, 229, 81 S. Ct. 1469, 1486, Mr. Justice Harlan in speaking for the majority, in a case involving the Jencks Act, 18 U.S.C. Section 3500, stated:

> "If it is said that the mere existence of such an enactment intends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted. It is, of course, true that quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspsiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that

legitimate political expression or association would be impaired, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with the 'substantive evils that Congress has a right to prevent.' *Schenck* v. *United States*, 249 U. S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. *There must be clear proof that a defendant 'specifically intend*[*s*] *to accomplish* [*the aim of the organization*] *by resort to violence.' Noto* v. *United States*, *post*, at p. 299. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.'" (Emphasis supplied.)

And similarly, in the application of the statute at bar must there "be clear proof" of intention, and this proof becomes self-evident when a defendant expresses conduct, whether by "words or act," in the clear and concise language of the statute ("mutilate", "deface", "defile", "defy", "trample upon", or "cast contempt"). There is no need to narrow the statute by any rewriting of it since it is already in acceptable form.

Further, there is no "straining" from the natural intendment of the statute so as to render it unconstitutional for vagueness under the Fifth Amendment and Fourteenth Amendments, and thus encourage the danger of condoning the existence of a penal statute which, in its enforcement, is capable of broad and discriminatory application. (Compare

Yu Cong Eng v. *Trinidad*, 271 U.S. 500, 46 S. Ct. 619 [1926]; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328 [1963]; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S. Ct 1659 [1964].)

No court or jury in trying cases involving alleged violations of New York's flag desecration statute will be required to indulge "in conclusive presumption[s] which testimony could not overthrow . . . and which all evidence considered together does not logically establish" so as to violate "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." (*Morissette* v. *United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 256 [1952].)

Compare United States v. *Balint*, 258 U.S. 250, 42 S. Ct. 301 (1922), and, *United States* v. *Behrman*, 258 U.S. 280, 42 S. Ct. 303 (1922), wherein the offenses involved "belong to a category of another character, with very different antecedents and origins" (*Morissette, supra* at 252, 72 S. Ct. at 244.)

The "void-for-vagueness" doctrine should not become "a tool to be designedly used in the service of other ends" (Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, note 98 at 87 [1960], if those ends will make subservient the well-being and security of our society. It is respectfully submitted that the appellant's act is particularly evil and should be so viewed by "the prevailing moral temper of [this] Court." (*Id.* at 87.)

Deference to the legislative intent requires that questions of "vagueness" and "overbroadness" be approached with cautious prudence. A statute not otherwise violative

of constitutional mandates does not become nugatory because of remote possibilities of misunderstanding. It is respectfully submitted that it has been herein demonstrated that a person of ordinary understanding will know when he is violating New York's flag desecration statute, and will easily recognize when someone else is.[18]

Finally, it is noteworthy that the statute limits its phohibition to encompass only speech and action occurring in public, so that private behavior toward the flag is not punishable.[19]

B

The appellant's conviction was predicated only upon his physical act of desecrating the flag of the United States, in public, and not for anything he verbally expressed at the time. Any statements attributed to him at the time were mere surplusage.

It becomes important to determine the ratiocination which motivated the police officer to make the arrest, the trial court to determine the appellant's guilt which was affirmed by an intermediate appellate court, and the ultimate pronouncement affirming the judgment of conviction by the State's highest court (*People* v. *Street*, 20 N.Y. 2d 231, 229 N.E. 2d 187 [1967], *supra*, appellant's Appendix 3a-10a.) For if this Court should in its wise judgment determine that the statute unconstitutionally impairs the precious right of free speech by including with its ambit "verbal expression," characterized by the language "words," in the statute, in

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[18] The appellees will endeavor to show that other objections to the statute advanced by the appellant are equally without merit (ARGUMENT D *infra*).

[19] See *State* v. *Peacock*, 25 A. 2d 491 (Sup. Jud. Ct.; Maine, 1942) (trial court's charge regarding "publicly" held erroneous).

contra-distinction to physical acts, also included in the statute, which the State of New York respectfully does not anticipate for reasons presented in ARGUMENT D *infra*, no legal justification would be present under the facts of this appeal which would warrant reversal of the conviction because of any claim "which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground [had been] selected." (*Yates* v. *United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073 [1957]; see also, *Stromberg* v. *California*, 283 U.S. 359, 367-68, 51 S. Ct. 532, 535; *Williams* v. *North Carolina*, 317 U.S. 287, 291-92, 63 S. Ct. 207, 210 [1942]; *Cramer* v. *United States*, 325 U.S. 1, 36, note 45, 65 S. Ct. 918, 935 [1945].

The New York Court of Appeals was not called upon to determine whether the appellant's vocal language attributed to him was of a nature deserving of castigation. It is noteworthy that Chief Judge Fuld prefaces the opinion of a unanimous court below as follows:

> "We are called upon to decide whether the *deliberate act of burning an American flag in public* as a *'protest'* may be punished as a crime" (*People* v. *Street*, *supra* at 234, 229 N.E. 2d at 189; appellant's Appendix 4A; emphasis supplied.)

Thereafter, the opinion of the court below elaborates on the principle of "nonverbal expression," and refers to a number of cases wherein determinations were required to be made of conduct involving physical acts which resulted in "a troubling of the wonted calm of the whole community, or of a sizeable segment thereof."[20] (See *People* v. *Street*, supra at 234-36, 229 N.E. 2d 189-91; appellant's Appendix 5a-7a.) Emphasis is also placed on the "incendiary" na-

[20] Black, *Law Dictionary* (4th ed., 1957) 246.

ture of the act of "burn[ing] the flag in public" (*Id.* at 237, 229 N.E. 2d at 189-90; appellant's Appendix 9a). Finally, Chief Judge Fuld in explaining that the trial court did not render an inconsistent verdict at the time of the dismissal of the more general charge of disorderly conduct, refers to "the *act* in question [as being] specifically prohibited by [the subject] statute." (*Id.* at 237-38, 229 N.E. 2d at 191; appellant's Appendix 10a; emphasis supplied.)

It is, therefore, indisputable that the appellant's act of burning the flag, and not any statements made by him, was the basis for the determination by the New York Court of Appeals, after careful appraisal of the trial record, notwithstanding reference made by the court below that the appellant had told "the small crowd which collected that, 'If they let that happen to Meredith we don't need an American flag.' " (*Id.* at 234, 229 N.E. 2d at 189; appellant's Appendix 4a.) With due deference to Chief Judge Fuld and the court below, it would appear that no such statement was made to "the small crowd," but, rather, to the arresting officer himself when he approached the appellant to inquire of him if he burned the flag (17a). It is true that the arresting officer substantially set forth the aforementioned statement in his complaint charging Malicious Mischief (appellant's Appendix B), but as has been emphasized by the State, this statement served only as a guide to the trial court in determining appellant's intent.[21] At the trial, the officer's unequivocal testimony showed that the statement, "If they let that happen to Meredith we don't need an American flag," was made only to him, and in response to an inquiry (17a). This appears to be substantiated by the appellant's own testimony on direct examination when he stated that he

[21] See p. 39 *supra*.

was asked by the officer "if [he] set fire to the flag," and after replying in the affirmative, added, that he also told the officer, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a). On continued direct examination, he acknowledged that he made the aforementioned statement to the police officer, and denied that he had spoken to anyone else (24a). Thus, there is nothing in the record to demonstrate whether others had heard this statement so that the basis for the charges of Disorderly Conduct and Malicious Mischief,[22] is, indisputably, for the physical act of burning the American flag in public, and in a contemptuous way.

The State of New York is further fortified in its position that the words expressed by the appellant were mere surplusage, and not any basis for his conviction whatever, by the following events disclosed in the record:

At the commencement of the trial, defense counsel informed the court that the United States and New York State Constitutions provided for protest in many forms, "whether it be by *burning* a flag, demonstration or picketing" (13a). (Emphasis supplied.) The following colloquy is significant:

> "Court: You say *burning* the flag is a form of demonstration?
> Mr. Goldstick: Yes". (13a). (Emphasis supplied.)
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> • • • • •
>
> Mr. Goldstick: Also, there is a Federal statute which provides for *burning* the flag . . . I refer Your Honor

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22. The flag desecration statute, *supra*, at the time of the occurrence was under Article 134 of the Penal Law of the State of New York, and this Article had for its sole purpose the prohibition of various forms of conduct, specified in detail, and denoted as "Malicious Mischief."

> . . . to the United States Code that a flag, when it is in such a condition that it is no longer a fitting emblem for display, should be *destroyed* in a dignified way, preferably by *burning* . . . New York State is without power to make a complaint and convict a man for the burning of an American flag (13a-14a). (Emphasis supplied.)
>
> Court: Motions denied. *The question here would be whether he burned it because it was in such poor condition that it should be burned,* or if it was an illegal demonstration" (14a). (Emphasis supplied.)

● When the police officer testified, he significantly stated that he had "asked the people in the crowd who *burned* the flag," and had asked the appellant "if he *burned* the flag" (17a) (Emphasis supplied.)

● The officer also testified that he "put out the fire and took the portions of the flag which were left [to] the station house" (17a; see also, 20a).[28] It again appears that the "act of burning," alone, prompted the arrest. From the condition of the flag, "[p]ortions of it was [*sic*] still burning" (19a), and the fact that the burning caused the appellant, by his own testimony, to drop it from his hand to the ground (23a), it would hardly be likely that the officer would have made the effort to extinguish the fire (17a) in order to salvage some physical evidence, if the arrest was truly predicated on the statements made by the appellant, and not on the burning itself. It would not be unreasonable to speculate that to the officer the act itself had greater impact than any of the statements made by the appellant. It will

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[28]See Appendix B-1, B-2 *infra* for copy of Property Clerk's Invoice, Police Department of the City of New York, indicating "[*f*]*ragments* of U.S. Flag" deposited by arresting officer, Patrolman James Copeland, on June 6, 1966, and "required as EVIDENCE." (Emphasis supplied.)

be recalled that the officer first came to the scene when he saw a fire burning and "thought some kids had started [it]" (15a). However, when he noticed that a flag was burning, he went into the crowd *in order to learn who was responsible for it* (15a-17a).

● The tenor of the appellant's cross examination was directed entirely to the act of the burning itself and not in one instance was any reference focused upon any statement made by him at the time he set fire to the flag (24a-25a). And at this juncture, defense counsel moved "to dismiss *on all the constitutional grounds previously made,*" as well as on pro forma grounds, and without further ado, following denial of motions, both sides rested, and judgment of guilt on the charge of Malicious Mischief was pronounced (25a).

● It is also to be noted that the appellant has at no time, either during trial, or in the course of the intermediate appeals to the Appellate Term of the Supreme Court of the State of New York, the New York Court of Appeals, as well as in his brief on file in this Court, relied on *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966), and taken issue with the manner in which the statement, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a), was obtained. Since *Johnson* v. *New Jersey,* 384 U.S. 716, 86 S. Ct. 1772 (1966) has left to the state courts the determination as to the retroactive application of *Miranda, supra,* and the New York Court of Appeals, later, in *People* v. *McQueen,* 18 N Y 2d 337, 221 N.E. 2d 550 (1966), mandated the application of the landmark determination of *Miranda* in favor of those defendants whose trials have

taken place *on or after June 13, 1966,* it becomes especially significant that no objection was raised by appellant's counsel even though the trial was *on July 26, 1966.*

See also, *Duigan* v. *United States,* 274 U.S. 195, 200, 47 S. Ct. 566, 568 (1927); *Husty* v. *United States,* 282 U.S. 694, 701-02, 51 S. Ct. 240, 242 (1930); and, *Lawn* v. *United States,* 355 U.S. 339, note 16 at 362-63, 78 S. Ct. 311, 324 (1958), which hold that only in exceptional cases will this Court review questions not raised below. It is respectfully submitted that this is not such a case. (See Rules of this Court, 15[c], and 23[1][c].)

There was no evidence adduced that the statement, "If they let that happen to Meredith we don't need an American flag" (17a), was within the hearing of anyone, except the police officer, so as to form a basis for the charge of "Disorderly Conduct." As already pointed out, this statement was volunteered to the officer by the appellant in response to an inquiry (17a). Since that statement was directed to the officer, and not within the hearing of others so to cause consternation amongst anyone, it is not likely that a police officer in the proper performance of his duty would have formulated any charge of disorderly conduct *for the statement privately made to him.* (See *People* v. *La Sister,* 9 Misc. 2d 518, 170 N.Y.S. 2d 702 [Court of Special Sessions of the City of New York, Appellate Part, First Department, 1958]; compare *State* v. *Riley,* 265 S.W. 874 [Mo. Ct. App. 1924], wherein *loud* insults were directed at a police judge while on a public street "in the main part of town and a good many people gathered," and the court held "that there was enough evidence to justify a jury in finding that a breach of the peace was committed" [*Id.* at 874-75; Trimble J.].). Thus, the evidence grows stronger that the gravamen

of the charges was *solely* the physical act of burning the flag in public, defiantly, and *not* any oral statements made by the appellant.

Although it is true the police officer testified that when he first came on the scene he heard the appellant exclaim, "We don't need no damn flag" (17a); the single and casual reference to this statement at the trial, taken with the fact that no allusion was made to it in the complaint (appellant's Appendix B), is strong indication that the said officer had not considered it at all when the charges were subsequently lodged against the appellant. Of course, as did the other statement attributed to the appellant, it served to portray a determined attitude to desecrate the flag.

Albeit everything said by the appellant confirms the presence of intent to debase the flag, it is respectfully reiterated that notwithstanding any statements voiced by him at the time, there was *ample* evidence from other circumstances surrounding the act as will be shown in ARGUMENT C *infra*, which made distinct his pernicious attitude *without* the necessity of relying on superfluous statements made by him on a street, in Brooklyn, New York, the day he set fire to our Nation's flag. The defendant cannot find solace in any argument that he was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense. (Compare *De Jonge* v. *Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259, [1937]; *Cole* v. *Arkansas*, 333 U.S. 196, 200-01, 68 S. Ct. 514, 516-17 [1948]; *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507-08 [1948]; see also, *Ginsberg* v. *New York*, 390 U.S. 629, 631-32, 88 S. Ct. 1274, 1276 [1968], note 1.). It was solely the act of burning the flag which led to the arrest and the sworn

complaint,[24] and for which the appellant was later tried and convicted.

Since it now appears that the trial court, as well as all counsel, were only concerned with the appellant's deliberate violation of the sanctity of the United States flag by publicly burning it in a disrespectful manner, the issue was clear and narrow, and no express findings were required. A court's judgment must be read and interpreted in the light of what was before it.

See *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F. 2d 871, 885 (6th Cir. 1943), *cert. denied*, 320 U.S. 800, 64 S. Ct. 431 (1944).

See also, 49 C.J.S. 862-69, sec. 436 (Judgments: Construction in General).

In passing, it must be stressed that none of the statements made by the appellant, which the State of New York claims to be merely extraneous because the acts, alone, were sufficient to, and did, impel the finding of guilt, were admitted into the record as the result of "prosecutorial comments," so as to require serious consideration of harmless-error statutes or rules (28 U.S.C.A., Sec. 2111).[25] (Compare

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[24] A study of the sworn complaint (appellant's Appendix B), reveals that its substance, particularly as set forth in the first paragraph, revolves about the burning of the flag. The significance of that is in no wise diminished even though the second paragraph, *still referring to the act of burning*, adverts to the extraneous statement made by the appellant. It is customary for a police officer to include in his sworn complaint some or all of the inculpatory statements or admissions made by a defendant at the time of arrest.

[25] 28 U.S.C.A. § 2111 provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Chapman v. *California*, 386 U.S. 824, 87 S. Ct. 824 [1967].) It was the appellant *himself* who testified that when he heard the news flash that James Meredith had been shot, he said, "They didn't protect him" (22a), and also confirmed the arresting officer's testimony by saying, "If they do what they had [*sic*] to Meredith we don't need this flag" (24a). Thus, the factual situation of the trial is remote from that which was condemned in *Chapman, supra*, and not violative of the Fifth and Fourteenth Amendments.

In any event, the trial of the instant case took place before a court without a jury. There is a strong presumption that where a court sits without a jury, it acts only on the basis of proper and legal evidence. (*Clark* v. *United States*, 61 F. 2d 695 [8th Cir. 1932], *aff'd*, 289 U.S. 1, 53 S. Ct. 465 [1933].) An experienced judge "is supposed to be able to 'sift the wheat from the chaff'." (*Ward* v. *State*, 105 S. E. 373 [1920].)

It must also be noted that the record shows that experienced counsel, who was both alert and persistent in protecting his client throughout the entire trial, did not attach any significance in the least to the statements ascribed to the appellant. Otherwise, a more resolute position would have been taken by counsel insofar as the effect the prohibition of verbal language concerning the flag would have in regard to constitutional guarantees.

C.

The appellant's singular behavior on a public street at the time of the burning made manifest, to all those who observed him, his purpose to desecrate the flag of the United States of America, thereby endangering public order and tranquility, as well as degrading a standard representative of American ideals.

The appellant's statements that he went "to a bureau drawer and *carefully* took out an old 48-star American flag," and after taking it to the intersection of Lafayette Avenue and St. James Place "first *carefully* laid a piece of paper on the sidewalk," and after setting fire to the flag, holding it as long as he could, then placing it *carefully* on the piece of paper so that it would not touch the sidewalk (Brief for Appellant, p. 3; emphasis supplied), are belied by the record of the case. According to the police officer the flag was not on a newspaper (21a), and although the appellant did testify that he "laid a piece of newspaper on the ground" (23a), there is no statement by him that he placed the flag on the paper prior to setting fire to the former. Rather, his testimony was that when the blazing flag began to burn his hand, *he let it drop,* without indicating whether or not it found its resting place on the newspaper (23a).

It is difficult to comprehend what beneficial purpose would have been served by placing the burning flag on a piece of paper, which itself would be quickly consumed by the flames, and thus not advance the suggested purpose for it, which the appellant would wish us to believe, namely, "so that [the flag] would not touch the sidewalk" should he drop the burning flag after holding it "as long as he could" (Brief for Appellant, p. 3). It is more credible that if any paper were present, its purpose would have been to facilitate the

burning of the flag. There is some credence to this view when it is recalled that the police officer had seen the appellant on the *northwest* corner of St. James Place and Lafayette Avenue, in Brooklyn, New York, while the flag was burning on the *northeast* corner of that intersection (15a, 17a, 18a, 19a). It would thus seem that the appellant was not intent in engaging in a dignified flag-burning ceremony as provided for by law,[26] for if he had, he would have remained at the place where the flag was burning, and until it was entirely consumed, without going to another location where he was seen motioning with his hands (17a), apparently in an *agitated* condition. It is inescapable that he had quickly set fire to the flag in an undignified manner, while vexed, and that his assertion of having paper at the time, for the purpose it is claimed by him (Brief for Appellant, p. 3) was but a feeble attempt at exculpation, and that any paper, if it did exist, was intended to serve as additional fuel for the burning.

All of the foregoing behavior, without more, unequivocally spelled out to his audience, the appellant's iniquitous design to desecrate the flag, and there was no need, it is again emphasized, for any verbal language on his part to fortify such a conclusion. The finding of guilt by the trial court crystallized the appellant's resolve by attaching credence to the police officers' testimony with regard to material facts, while necessarily negating any alleged good intent on the part of the appellant. A claim of guilelessness does not suit well one with an unworthy motive. It is this sort of

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26 See 36 U.S.C.A., Sec. 176(j): "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning. June 22, 1942, c. 435, sec. 4, 56 Stat. 379; Dec. 22, 1942, c. 806, sec. 4, 56 Stat. 1076." This subdivision is prefaced by the language, "No disrespect should be shown to the flag of the United States of America. . . ."

action which clearly spells out intent. In *Cramer* v. *United States*, 325 U.S. 1, 65 S. Ct. 918 (1945), *supra*, Mr. Justice Jackson, in referring to a defendant's deportment, clearly stated:

> "Since intent must be inferred from conduct of some sort, we think it permissible to draw usual reasonable inferences as to intent from overt acts. The law . . . assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. (*Id.* at 31, 65 S. Ct. at 933.)
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> "Environment illuminates the meaning of acts, as context does that of words. What a man is up to may clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and consequence of his acts with those of others, the interchange between him and another, the give and take of the situation." (*Id.* at 33, 65 S. Ct. at 934.)

In fine, the disparity in the testimony regarding important facts, i.e., where the appellant was standing at the time the flag was burning, the presence of a piece of newspaper, the "concern" with which the flag was being handled, the decision to burn it then because it was made obsolete by its 48 stars, and at a time when he was upset by the shooting of Meredith, notwithstanding the fact that he had decided to burn the old flag "[a]fter he had purchased the new one" a while back (24a, 25a), was material in determining culpability, and served to characterize the appellant's testimony as unworthy of belief.

In *The Santissima Trinidad* and *The St. Ander*, 20 U.S. 280, 337, 7 Wheaton 283 (1822), Mr. Justice Story had this to say:

> "If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances are bound upon principles of law, and morality and justice, to apply the maxim falsus in uno, falsus in omnibus. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

Thus, the *public* behavior of the appellant, as aforesaid, did at that juncture attach a *fait accompli* to the crime so that the finding of guilt is no longer left in doubt. But if there be further proof required to make more secure the appellant's guilt, the State of New York need only point out the angry statements made by him at the time, without yielding one iota from its position taken that he was convicted for the *act* of burning only, as was stressed in ARGUMENT B. *supra*.

And when we consider other facts *before* he went into the street, and burned the flag which had once draped the casket of his wife's stepfather,[27] about 20 years before

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[27] The appellant's counsel alludes to the stepfather's burial as a war veteran (Brief for Appellant, p. 3), although the record is devoid of such proof.

Appellant's counsel also gratuitously stated that the stepfather "had been revered by both appellant and his wife (Brief for Appellant, p. 3), although that is reasonably inferable from the testimony (23a).

(23a) and which flag had obviously once had great meaning for him and his family, it appears incredible that the appellant should have entertained the idea of disposing of a precious keepsake in the first place, even if in a "dignified manner!" Having heard the news flash about the shooting of Meredith, and by his own testimony stating while still at home, "[t]hey didn't protect him." (22a), the appellant was immediately catapulted into "hysterical" conduct which was fraught with contempt for the flag of the United States of America. And more meaningful does his contempt become when we reflect that he served in the military service of the United States, for which he was decorated (22a), and for whom the flag should have had great significance as it evidently did by the retention of it for 20 years, and the purchasing of a new one for display on holidays (24a). It would not be uncharitable to characterize the appellant's conduct on the day of the occurrence as not only one of contempt, but of arrogance and rebellion as well. The fact that the flag had been neatly folded does not redound to the appellant's benefit. The evidence does not disclose whether the flag was folded for the first time after the news flash was heard, or whether it had already been folded before it was removed from the dresser drawer (22a-23a). The testimony is susceptible of the latter view. In any event, the evidence is probatively weighted so as to remove any doubt whatever regarding the appellant's intention to violate the statute.

Under such circumstances the trial court was warranted in applying the well-established principle of law that the trier of the facts is justified in accepting that portion of the testimony of a witness which is inculpatory while rejecting that which is exculpatory.

Compare *Henze* v. *State*, 154 Md. 332, 347, 140 A. 218, 225 (1925).

On oral argument before the New York Court of Appeals, the appellant's counsel disavowed a prior contention that the flag was obsolete because it contained but 48 stars.[28] There was indeed no evidence forthcoming that because of its condition "it [was] no longer a fitting emblem for display," and was being "destroyed in a dignified way, preferably by burning" (36 U.S.C.A., Sec. 176 [j], *supra*). The proof to the contrary is unassailable.

That the appellant retained a 50-star flag (23a), and had planned to burn the 48-star flag, although he claims to have selected such an occasion to do so, has no effect whatever in weakening his accountability for the venomous act which, in those provoking and tarnishing moments, reduced the flag of the United States almost to complete ashes. That a suspended sentence was imposed was attributed to the presence of "mitigating circumstances." (See *People* v. *Street*, 20 N.Y. 2d 231 [1967], *supra* at 237, 229 N.E. 2d at 191; appellant's Appendix 10a). It is also important to reiterate that although the appellant was charged with "Disorderly Conduct and . . . Malicious Mischief" (14a) the New York Court of Appeals acknowledged that the appellant was convicted in accordance with the statute which specifically prohibited his act, rather than under "the more general

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[28] See *People* v. *Street*, 20 N.Y. 2d 231 (1967), *supra*, note 4 at 237; 229 N.E. 2d at 191; appellant's Appendix 9a.

The statute before this Court in referring to "the colors, the stars, and the stripes," adverts to "any number of either thereof," and although the flag was faded (23a), the statute also describes such a standard as being "represented on any substance, and purporting to be "the flag . . . . of the United States of America." At the time the appellant himself referred to the flag as "[t]he American flag" (22a).

charge of disorderly conduct", so that there was no "inconsistent verdict." (*Ibid.*)

D.

The statute is in all respects a proper exercise of the state's police power, and does not unconstitutionally abridge the fundamental right of expression. The appellant's act of burning the flag, in the manner employed, is not symbolic speech and hence is not entitled to be protected by the First Amendment.

The appellees are mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech (First and Fourteenth Amendments to the United States Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373, 47 S. Ct. 641, 647 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244, 56 S. Ct. 444, 446 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55, 49 S. Ct. 448, 451 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Supreme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the States. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543, 42 S. Ct. 516, 522 [1922].) In 1925, the Court in *Gitlow* v. *New York*, *supra* at 666, 45 S. Ct. at 630, "ventured the tentative assumption that the 'freedom' of speech

protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the States. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 1183 (1943), *supra*, is particularly noteworthy as showing just when a State may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was this Court's majority view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634, 63 S. Ct. at 1183.)

Yet, conceding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with free speech, it is respectfully submitted that a State may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts*, 167 U.S. 43, 47, 17 S. Ct. 731, 733 [1897]; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 439, 31 S. Ct. 492, 497 [1911]; *Schenck* v. *United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249 [1919]; *Gitlow* v. *New York*, 268 U.S. 652, *supra* at 667, 45 S. Ct. at 630; *Whitney* v. *California*, 274 U.S. 357, 371, 47 S. Ct. 646, 647 [1927], *supra*.)

In order to sustain the position of the appellees herein, it becomes vital to point out in some detail the philosophy underlying the need for a statute such as sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra*.

In *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), Mr. Justice Patterson, in emphasizing the need for the statute, stated as follows:

> "It was competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon or cast contempt, either by word or act, upon the National or State flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the State, for its relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the indignation of the public and lead to the infliction of summary chastisement upon an offender; for *it is not a mere rhetorical phrase to say that the people have constituted themselves the guardians and protectors of the National flag.* The State has taken upon itself the punishment of those whose acts would excite the people to violence, and legislation to accomplish that result relates directly to the preservation of the public peace and the good order of society." (Emphasis supplied.)

It is significant that Mr. Justice Patterson's language was later unanimously approved by the Court of Appeals of the State of New York (178 N.Y. 425, *supra*), although the court also affirmed a finding that another portion of the statute, not pertinent herein, was constitutionally defective since it was improperly applied, also, to articles manufactured and in existence before the section was enacted, thereby destroying existing property rights.

Nor has the Supreme Court of the United States failed to voice its feeling about the "object of national piety"

(*Durable Toy & Novelty Corporation* v. *J. Chein & Co.*, 133 F. 2d 853, 855 [2d Cir. 1943] (Learned Hand, J.). In *Halter* v. *Nebraska*, 205 U. S. 34, 27 S. Ct. 419 (1906) Mr. Justice Harlan, in passing upon the constitutionality of a statute which proscribed the use of the flag for advertising purposes, stated:

> "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then, remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. (*Id.* at 41, 27 S. Ct. at 421.)
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> "[W]e are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; se-

curity against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." (*Id.* at 43, 27 S. Ct. at 422.)

Although *Halter, supra,* was concerned with the use of a representation of the flag in an advertising scheme, the case is nevertheless pertinent because the statute therein involved contained language substantially analogous to the statute now before this Court. That case becomes even stronger authority when we realize that the flag had been used for advertising purposes, which is less of a threat to public order than the use to which the present appellant applied it.

It is also significant that many States have subscribed to the view that the flag of the United States merits respect as a symbol of Americanism, and "an object of patriotic adoration" (*Halter* v. *State,* 74 Neb. 757, 105 N.W. 298, 300 [1905].) Accordingly, the Legislatures of those States have promulgated legislation to protect its meaning.[29]

In *People* v. *Picking,* Misc. , 23 N.Y.S. 2d 148, 149 (N.Y. City Mag. Ct. 1940), *aff'd,* 263 App. Div. 366 (1st Dept. 1942), *aff'd,* 288 N. Y. 644 (1942), *cert. denied,* 317 U.S. 632 (1942), *supra,* the trial court referred to the instant

[29] See *Halter* v. *Nebraska,* 205 U.S. 34, 39-40, 27 S. Ct. at 421, *supra.* Other states have since followed suit.

statute as a "salutary one." The New York Court of Appeals affirmed the judgment of conviction and upheld the constitutionality of the statute without opinion. The conduct condemned by the trial court had been one which involved the placing of an advertisement on a car in close proximity to the flag of the United States.

Section 1425, subdivision 16, of the Penal Law, *supra,* has been the subject of interpretations through the years. In 1934, Hon. John J. Bennett, Jr., as Attorney General of the State of New York, advanced the opinion that the "intent of the legislature in enacting Section 1425 was to insure that the use of the Flag of the United States, or of the representation thereof be appropriate and respectful." (See 51 N.Y. State Dept. Rep. 240 [1934].) "The statute is comprehensively designed to prevent desecretion of the Flag . . . of the . . . United States." (See 1941 N.Y. Att'y Gen. Rep. 465)

At the time of the trial, appellant's counsel argued that the statute was inconsistent with 36 U.S.C.A., Section 176 (j), *supra,* note 26, and, thus, violative of the Supremacy Clause of the United States Constitution (14a). Such an argument is inappropriate.

There is no provision in the federal law which prohibits a State from enacting and enforcing legislation designed to prevent disrespect to a symbol of Americanism.[30] The

[30] In fact, the statute formulated as the result of Hearings before Subcommittee No. 4 of the Committee of the Judiciary House of Representatives, 90th Congress, 1st Session, 1967, Report No. 350, *supra* at note 11, wisely dispels any doubt in this regard by expressly reserving to the "State, territory, possession of the Commonwealth of Puerto Rico . . . jurisdiction over any offense over which it would have jurisdiction in the absence of this section" (H.R. 10480, chapter 33, title 18, U.S.C.A., Sec. 700 subsec. (c).

American flag is as much a part of a State as it is of the Nation. Any contempt cast on it also affronts the dignity and well-being of a State. (*Halter* v. *Nebraska, supra.*)

That a State has the power to so legislate was succinctly expressed by Mr. Justice Harlan in *Halter* v. *Nebraska,* 205 U.S. 34, 27 S. Ct. 419, *supra,* as follows:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each State, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." (*Id.* at 40-41, 27 S. Ct. at 421.)
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> "It may be said that, as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation, to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that, in the absence of National legislation, the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. . . . [A] State may exert its power to

strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it." (*Id.* at 41-42, 27 S. Ct. at 421-22.)

In *Ex parte Starr*, 263 F. 145, 146 (Dist. Ct., Mont. 1920), it was held that a state statute was not pre-empted by Federal legislation which "neither pardons the offense nor draws it within Federal jurisdiction."

It is noteworthy that a statute similar to the instant one was passed in the District of Columbia in 1917 (4 U.S.C.A., Sec. 3).

See 36A, C.J.S., 746, sec. 2, (Flags: Laws Relating to United States or State Flags).

In fine, both the New York and federal statutes do not conflict with each other since both are designed to prohibit that conduct for which the appellant herein was tried and found guilty.

It is the appellant's contention that the statute involved, designed to prevent breaches of the peace which would be imminent if the flag were desecrated, as well as to protect a respected symbol, estops persons from the free transmission of ideas. According to the appellant the act of flag burning, when intended solely as an act of communication of ideas, is permissible since no secondary effects, or "by-products",

of the act will follow that will frustrate a governmental interest. And in support of such contention, the appellant relies upon such cases as *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532 (1931), *supra; Thornhill* v. *California*, 310 U.S. 88, 60 S. Ct. 736 (1940); *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963); *Brown* v. *Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966). Compare *Walker* v. *City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824 (1967).

In none of the foregoing cases were any of the acts evinced therein other than those of "peaceful" or "conciliatory" conduct, nor beset with agitation as in the instant case. It was that which prompted this Court to recognize those acts *as forms of symbolic expression* deserving of protection under the First Amendment to the United States Constitution because the arrests had foreclosed peaceful non-verbal means by which persons could make themselves heard.

The appellant's behavior in burning a symbol of Americanism in a public place, while simultaneously spewing words of contempt, was not an act of "peaceful" expression entitled to constitutional protection. This act of "violence,"[31] regardless of its degree, cannot be protected even though the appellant verbally expressed views such as, "We don't need no damn flag," and, "If they let that happen to Meredith we don't need an American flag" (17a). (Compare *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502, 69 S. Ct. 684, 688-89, 690-91 [1949], wherein it was held that violence or other unlawful conduct will not

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[31] "Violence" is defined as follows: 1a: exertion of any physical force so as to *injure or abuse* . . . , 2: injury in the form of revoking, *repudiation* . . . or *irrevance to a thing* . . . , 3b: *vehement feeling or expression*. . . ." (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

be protected "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.")

Accord, Cox v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965); Same parties, 379 U.S. 559, 564, 85 S. Ct. 453, 480-81 (1965).

The appellant's act of burning the flag, because of its undermining effects upon society, is not entitled to be dignified by affixing to it the appellation of "symbolic speech." No act can be considered "symbolic speech" if it interferes with the legitimate functions of government, which in this case are to preserve peace, good order and morals, as well as a symbol of our existence as a democratic society having a great history, and a still greater future. Yet, even *if* we were inclined to extend symbolic communication beyond its true and acceptable meaning, as gleaned from the foregoing cases relied upon by the appellant, it is respectfully reiterated, nonetheless, that from the very nature of the appellant's act of publicly desecrating the flag by burning, attaching to it the protection afforded by the First Amendment to the United States Constitution would be unwarranted. Symbolic speech has never been given the same significance as the written or spoken word. As stated by Mr. Justice Goldberg in *Cox* v. *Louisiana,* 379 U.S. 536, 555, 85 S. Ct. 453, 464-65 (1965), *supra*:

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the *same kind of freedom* to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (Emphasis supplied.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida*, 385 U.S. 39, 47-48, 87 S. Ct. 242, 247 [1966] [Black, J.].)

Thus, Mr. Justice Black has also drawn a line between pure speech and conduct.

Appellant's diaphanous attempt to attribute symbolic meaning to his act because "[a]ll communication is basically that," and "[l]anguage is nothing more than a higher developed set of abstract symbols (Brief for Appellant, p. 21), must be rejected, even though reliance is predicated upon such eminent authority as the Encyclopedia Britannica. The act of the appellant is no different than hurling a stone through the window of the White House, painting the latter black, while trespassing, or setting fire to the National Archives. Certainly one would not be permitted to communicate with another by sending smoke signals in a busy metropolis to the annoyance of its inhabitants. Appellant likens the burning of the flag to the burning of an effigy of the President. (Brief for Appellant, p. 25). Burning an effigy of a President, bad as it is, would not take on the same meaning as burning our Nation's flag. The former act will ordinarily be construed with a political connotation, while the other is not likely to since it is an offense directed at the *foundation* of government itself. The boundaries of symbolic speech must be fixed where the dangers to society threaten to erupt. At that point the conduct ceases to have permissible communicative effect.

See also, *People* v. *Stover*, 12 NY 2d 462, 191 N.E. 2d 272 (1963), *appeal dismissed*, 375 U.S. 42 (1963) (symbolic ex-

pression "offending sensibilities"); *People* v. *Martin*, 15 NY 2d 933, 207 N.E. 2d 197 (1965), *cert. denied*, 382 U.S. 828 (1965) (sit-in); *People* v. *Penn*, 16 NY 2d 581 (1965), *cert. denied*, 383 U.S. 969 (1966) (picketing).

The appellant emphasizes the importance of evolving newer and more dramatic forms of communication, so that greater impact can be gained "upon . . . persons in the immediate vicinity," and thus "unlock the key to the mass media as well." (Brief for Appellant, p. 31). The State of New York does not deny that demonstrations, for example, are often beneficial in winning justice for people, but it is the type of conduct conducive to the proper transmission of ideas as found in *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, *supra*; *Thornhill* v. *California*, 310 U.S. 88, 60 S. Ct. 736 (1940), *supra*; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961); *Edwards* v. *South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963), *supra*; *Brown* v. *Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966), *supra*, which has greater impact upon encouraging reforms that will eradicate the unfortunate evils existing in our society. Indeed, eloquent and articulate spokesmen are attracted to the causes of socially and economically-disadvantaged persons, or for that matter to any other question espoused, when predicated upon rational and truly meaningful conduct. In the instant case, the appellant's act of burning the United States flag to express his resentment for the unfortunate shooting of James H. Meredith, the latter deed not having been committed by the Nation, but by private persons whose censurable proclivities no amount of paternalistic legislation or reform could ever alter, is in no wise related to those acts set forth in the cases referred to directly above-cited. There, the conduct was directed, in the

main, at *governmental operations,* local state or federal, and not the "private" act which resulted in injury to a respected civil rights advocate.

In addition, the act of the appellant did not, on its face, spell out the particular problem for which he was seeking ameliorative changes. But not for some chance utterance, his conduct appeared to have no sound basis, and took on the garb of rebellion. In each of the aforementioned cases, the action indicated clearly the reason for the behavior displayed, nor was any act done which had the tendency to obliterate *all* respect for the Nation. The appellant's act was as if an anarchist had hurled a bomb on that which he wished to destroy, not improve. The moment the appellant set fire to the flag, there was no intention on his part to bring on needed reform. He had set fire to the Nation itself. What was intended as civil disobedience was perverted into an attack on a statute which actually did not offend him.

Dissent regarding particular policies of a Nation is one thing, but desecration of the American flag is a repudiation of everything, including the basic political spirit of the Country, and the Constitution which speaks for it and its inhabitants. The former mode of dissent is invaluable as an aid in the Government's self-correction; the latter, however, leaves naught to remedy, for not being dissent in the accepted sense, it becomes a call for destruction. Flag desecration, whether by "words or act," is dangerously disquieting, and removes, by its infantileness and irrationality, the perpetrator from the scene of effective discussion, and leaves instead, the lit fuse of peril to public safety and the eventual, but almost certain, decadence of the Nation's spirit.

It would appear that the appellant seeks to rely solely upon the "clear-and-present-danger" doctrine by para-

phrasing its basic principle in its earliest version," that [m]ore than a mere possibility is required" when related to the suppression of speech "merely because it *might* lead to a substantive evil." (Brief for Appellant, p. 27; emphasis in original.) Notwithstanding this, however, it is the State's considered submission that other tests are equally applicable to the instant appeal for reasons hereinafter set forth.

The classic "clear-and-present-danger" test is succinctly set forth in *Schenck* v. *United States*, 249 U.S. 47, *supra* at 52, 39 S. Ct. at 249 (1919),[32] when Mr. Justice Holmes expressed the view that "'[t]he question in every case is whether the words used are used in such circumstances and and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

However, it now appears that in recent Supreme Court decisions, particularly in those matters involving narrowly drawn statutes which on their face regulate conduct, rather than the communication of ideas, as in *Schenck*, the "clear-and-present-danger" test has been replaced with a "balancing-of-interests" test. Prior to then, and according to Mr. Justice Brandeis, who, as co-architect, amplified the "clear-and-present-danger" test, "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to

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[32] *Schenck* involved conduct as a means by which to accomplish sedition in time of war, and in violation of the Espionage Act of June 15, 1917. *Accord. Frohwerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249 (1919); *Debs* v. *United States*, 249 U.S. 211, 39 S. Ct. 252 (1919).

be applied is more speech, not enforced silence. Only an emergency can justify repression." (See *Whitney* v. *California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 [1927], *supra*, [concurring opinion].) Yet, despite the views of Mr. Justices Holmes and Brandeis, it thereafter became necessary to apply a "balancing-of-interests" test by which "conduct [was] regulated in the interest of public order" so that it became necessary to allow the operation of a regulation albeit there was an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn* v. *Douds*, 339 U.S. 382, 399, 70 S. Ct. 674, 684 [1950] *supra*.)[33] Now the stage was set for the courts to decide which of two conflicting interests dictated the greater need for protection. The courts in applying this new formula would be required in each case to "balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment*, 72 Yale L.J. 877, 912 [1963].

Thus, in *Dennis* v. *United States*, 341 U.S. 494, 510, 71 S. Ct. 857, 868 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), *supra*, four of the six members of the Court who joined in upholding the conviction, accepted Chief Judge Learned Hand restatement of the "clear-and-present-danger" test,[34] thereby diluting it into a balancing test.

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[33] It was in *Douds* that Mr. Chief Justice Vinson first clearly enunciated the "balancing-of-interests" test.

[34] The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.)

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461, 78 S. Ct. 1163, 1171 (1958); *Barenblatt* v. *United States,* 360 U.S. 109, 126-27, 79 S. Ct. 1081, 1093 (1959); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49-51, 81 S. Ct. 997, 1006-07 (1961); *United States* v. *Aarons,* 310 F. 2d 341, 345 (2d Cir. 1962),[35] and *United States* v. *Miller,* 367 F. 2d 72 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967).

The "balancing-of-interests" test denied that any speech has an absolute right of protection under the First Amendment. That free speech is not absolute was also recognized by Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357, 373, 47 S. Ct. 641, 647 (1927), *supra,* (concurring opinion).[36]

Yet, even the "clear-and-present-danger" test as restated by Judge Hand in *United States* v. *Dennis* (2d Cir. 1950), 183 F. 2d 201, 212, *supra,* has not entirely lost its vitality for as one writer has observed:

> "Its essential features have been preserved, but adapted to the peculiar fact-situation presented by the menace of current Communist enterprise. In its

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[35] It is interesting to point out the court's statement (per Circuit Judge Friendly) that "[e]ven if we were to assume in appellant's favor that action designed 'to block the launching' constituted speech . . ., 'freedom of speech . . . does not comprehend the right to speak on any subject at any time', American Communications Assn. v. Douds, 339 U.S. 382, 394 . . ." (310 F. 2d at 345.)

[36] It is significant that in *Board of Education* v. *Barnette,* 319 U.S. 624, 643, 63 S. Ct. 1178, 1188 [1943], *supra,* Mr. Justices Black and Douglas stated that "[n]o well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far."

> new form the rule might be called the 'electric eye' theory of clear and present danger. The danger is deemed to exist if there is a present and continuing mechanism which upon the occurrence of appropriate conditions will trigger into activity a future operation which constitutes a danger of substantial magnitude." See (DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 122 [1957], *supra.*)

Ought not the atmosphere of these times also prompt us to deem the application of such a test (as restated by Chief Judge Learned Hand) as equally appropos? Is not the appellant's act (although having affected the sensory perceptions of but a relatively small segment of our population on a Brooklyn street) *when taken with the manifold dangerous behaviorisms of our day,*[37] *one which may "trigger into* activity a future operation which constitutes a danger of substantial magnitude?" Is the act less dangerous because the likelihood that its effect, unlike in *United States* v. *Dennis,* 341 U.S. 494, 71 S. Ct. 857 (1951), *supra,* does not *immediately* envelope a much larger audience? Might not the rebellion of the appellant, particularly by the desecration of an American flag, in an area of sympathizers have the same imminent and basically devastating effect as the acts of Dennis and his followers (see Appendix C). One need only reflect on present-day occurrences to note the oft-repeated patterns of rebellious behavior, as distinguished from proper dissent, that have come to life throughout the length and breadth of this land.

The "clear-and-present-danger" test has never been a technical verbal formula. (See *Pennekamp* v. *Florida,* 328 U.S. 331, 352-53, 63 S. Ct. 1029, 1040 [1946] [Frankfurter, J., concurring].). And whether or not the modified test of

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[37] See p. 72 *infra.*

Chief Judge Learned Hand be applied, it, too, as the "balancing-of-interests" test, can be practically considered in the instant appeal so that the appellant's act cannot escape the reprobation it so richly deserves. Is not an act such as committed by the appellant one which will "treasonably" lend aid and comfort to the enemy by strengthening its hand? Any failure to preserve law and order creates the clear and present danger that the expression involved, *symbolic or otherwise,* "will bring about the substantial evils that Congress has a right to prevent." (*Schenck* v. *United States,* 249 U.S., *supra;* at 52, 39 S. Ct. at 249 [1919].) The question of free expression must yield to the higher requirement that the United States of America must survive in the hostile atmosphere of a tumultuous present-day history. It is this vital need which makes even the words by the appellant, in derogation of the flag, without more, subject to criminal punishment. Circumstances appear again to have restored the *Schenck, Frohwerk,* and *Debs* cases,[38] to a new vitality.

The American flag symbolizes everything dear to us, and is entwined within the very framework of our Bill of Rights. The flag is a home away from home and throughout the world whenever an American chances to see it, the inspiration derived from its presence is immeasurable. To accord the appellant license to mistreat the flag is as implausible and inconceivable as a determination that one has a constitutional right to destroy the Constitution. For it was on June 14, 1977 that "Old Glory" was formally adopted by the Continental Congress as the national flag, and ". . . the

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[38] *Schenck* v. *United States,* 249 U.S. 47, 39 S. Ct. 247 (1919), *supra; Frohwerk* v. *United States,* 249 U.S. 204, 39 S. Ct. 249 (1919), *supra; Debs* v. *United States,* 249 U.S. 211, 39 S. Ct. 252 (1919), *supra.* See note 32 *supra* at 67.

flag like the nation itself, evolved slowly and painfully from small beginnings; that it was shaped by many hands and brains..." (Butterfield, *Foreword* to Quaife, Weig & Appleman, THE HISTORY OF THE UNITED STATES FLAG at 11 [1961].)

To sanction the appellant's conduct as a form of constitutionally protected expression is to lend aid and comfort to those who seek to corrupt the very foundation of the liberties we seek to preserve. Thus, those liberties which are inherent in the wellspring of Democracy are debased and negated so that the cherished liberty of free speech, symbolic or otherwise, becomes slowly and undeniably destroyed, rather than perpetuated. Contempt and hatred are contagious and misanthropes, totalitarians, and malcontents harken to their call. To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire,* 312 U.S. 569, 574, 61 S. Ct. 762, 765 [1941].) The appellant by his conduct was in a manner openly inviting others to share his contempt for the flag and the Country it represents. It is in these times, especially, that honor to the flag must be given its fullest meaning. To condone the public disapprobation of a precious and inspiring symbol of America itself becomes, with other recent events[39],

[39] The assassinations of a President, United States Senator, and Nobel Peace Prize recipient, destroying of draft cards, wholesale evacuations to Canada to avoid military service, student riots, the most serious being at Howard and Columbia Universities, disturbances in socially and economically disadvantaged areas, emergence of a "hippie" generation, open disregard for decorum on the part of elected officials, rise in crime statistics, activities of extremist groups, and the new "palliative" (?) world of LSD and its psychedelic adventures. This would appear to indicate that we are already in the epoch where some of these events, particularly the desecration of the flag by "words or act," will give rise to an angry crowd, thereby mandating some reasonable restrictions with regard to speech and conduct. Americans have more to fear than the dangers of the Communist Manifesto!

a vivid reflection of disrespect for our institutions. Society may soon find itself urgently in need of preparing for the likelihood that this Nation may find it exceedingly onerous to withstand the challenges of an era of arrogance. Can anyone of us, today, honestly and confidently, take the position that the appellant's act of defiantly burning the flag, if ignored and left unpunished, will not finally ignite the spark of conflagration and chaos tomorrow? One need not be a prophet of doom to state that we must look at reality with a circumspect eye. It would be the height of naiveté to say that we are living in a predominantly patriotic society free from undermining influences. It would appear reasonable to state that we are part of a society which consists of a significant populace who either have chaotic and anarchic thought, on the one hand, or, who harbor cold indifference, on the other. To legitimatize the appellant's unforgiveable act is to draw the attention of the world to our problems, with ensuing disrespect. Certainly there can be no reverence for a flag that can be defiled and treated with contempt. Nor will there be any meaning left for the flag which draped the caskets of those who shed their lives for our Nation, and inspired countless deeds of glory. To dignify the appellant's conduct is to reduce the flag to an empty piece of cloth, and to transform it from meaningfulness to meaningless ornament. If the flag is now to take on merely an ornamental significance, then can it not be said that those who have shed their lives for it were not only duped by it, but that it has made a mockery of patriotism? *It cannot be denied that to scorn a flag is to erode a nation from within!*

There is a public interest in having our flag waving as a symbol of the United States. Disrespect for it is inimical

to the public welfare and can only encourage others to do the same.[40] The flag must continue to remain in an exalted position as symbolic of unity, strength, and friendly recognition. Where healthy criticism may help to correct, the appellant's act can only chip away at the pillars of democracy.

Can we say that our citizens of earlier days have toiled and sacrificed for ideas that the appellant may now be free to make worthless? Should one generation be permitted to nullify the dreams begun by those who preceded us? To tolerate that will extinguish the light which illuminates the path of human achievement. Great men, great thoughts, and great times cannot be brought forth from such perilous behavior. Man's betterment requires richer soil in which to flourish. "Perhaps at no time in our Nation's history has there been a greater need to make clear to all that the United States Constitution does not render States impotent . . ." (*Cameron* v. *Johnson*, 381 U.S. 752, 753, 85 S. Ct. 1751, 1757 [1965] [Black, J., dissenting, in which Harlan and Stewart, JJ. or join].)

While such cases as *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*, hold that one need not salute the flag; it does not follow from such a determination that it can become the proper subject of desecration, or upon which to cast calumny. The statute extirpated in *Barnette, supra*, compelled

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[40] For pictorial representations of flag burnings here and abroad, see Appendices C and D *infra*.

See also, N.Y. Times, April 29, 1967, p. 35 col. 2 (Madrid University students reported burning American flags on April 28, 1967). For a general treatment of present-day attitudes toward the flag, see Life Magazine, *A Test for Old Glory*, March 31, 1967, p. 18; Battle Over the Bill of Rights, *id.* at 22; Hoge, *A Record of Flag Desecration*, American Legion Magazine, November, 1967, p. 6.

positive action of saluting the flag. The present statute does not require any affirmative action nor does it prescribe orthodox conduct. It simply forbids public acts of dishonor to the flag of the United States. The right to communicate ideas or engage in political dissent or protest in a *responsible manner* remains unimpaired. The encouragement of reverence and respect for the flag is not to be equated with compelling one to express a belief contrary to the dictates of conscience. Such inspiriting becomes implanted in others when "words or act(s)" of defilement of the flag are not caused to be impressed upon their senses.

A love for our flag can blossom without being impelled by a chauvinistic attitude, nor need the desire to protect it be affected by hysteria[41]. (Compare *Ex parte Starr*, 263 F. 145 [Dist. Ct., Mont. 1920], *supra*.) Affirmance of the appellant's conviction will in no wise detract from the commendable fidelity with which this Court has always defended freedom to act, or speak one's mind.

On August 27, 1952, Adlai Stevenson stated in New York:

> "What do we mean by patriotism in the context of our times? . . . A patriotism that puts country ahead of self; a patriotism which is not short, frenzied outbursts of emotion, but the tranquil and steady dedication of a lifetime. These are words that are easy to utter, but this is a mighty assignment. For it is often easier to fight for principles than to live up to them."[42]

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[41] The principles of the American's Creed are followed throughout the Nation, and one of its principles sets forth "respect to the flag." That many adhere to this principle is made evident by the number of flags sold by *one* New York City newspaper in less than one year (see Appendix E *infra*).

[42] Fullbright, *The Arrogance of Power* 22 (1966).

Any view that the instant statute has for its purpose the encouragement of adhering to symbols cannot be accepted as sound. As aptly stated by Mr. Justice Frankfurter in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), *supra*:

> "We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. *But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes.*" (*Id.* at 662, 63 S. Ct. at 1196, dissenting opinion, emphasis supplied.)

It is for this reason that no merit ought to be attached to the appellant's contention that since "flag destruction is in some metaphysical way an affront to our symbolic sovereignty, [i]t cannot and ought not form a basis for punishment." (Brief for Appellant, p. 25.)

Assuming, *arguendo*, that the appellant herein found that a free speech interest existed in flag desecration, particularly, flag burning, applying the "balancing-of-interests" test, the governmental need for a symbol such as a flag and the encouragement of respect for it by all citizens, without mandating it (particularly among the young and impressionable, aliens who may wish to become our citizens, visitors from abroad, and foreign nations as well) greatly outweigh the concern for free expression, and the enactment of a law outlawing public desecration of the flag by "words or act," is a reasonable and unarbitrary means toward implementing the encouragement of such respect. Since the indi-

vidual, unlike the State or Nation, has alternatives in making himself heard, his free speech interest needs to be limited.

It was for this reason that a "governmental interest" was accorded protection recently in *United States* v. *O'Brien*, U.S. , 88 S. Ct. 1673 (1968), when this Court, in a majority opinion, condemned conduct "having no connection with speech" (*id.* at 1678), to wit, destruction of certificates issued by the Selective Service System. There, too, it was reiterated that the Court could not "accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*id.* at 1678). Significantly Mr. Chief Justice Warren added:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." (*Id.* at 1678-79.)

The appellant ought not to be permitted to say that prohibiting him from desecrating the flag by "words or act,"

will have "the effect of *entirely* preventing [him] from reaching a significant audience with whom he could not otherwise lawfully communicate." (*Id.* at 1685, Black, J., concurring; emphasis supplied.) The appellant can convey his message in other ways.[43]

The "governmental interest" referred to in *United States v. O'Brien, supra*, also mandates protection for the American flag, so that its desecration will not create for those who honorably serve their Country in one conflict, and who are not the masters of their fate, another battleground, purely psychological and emotional, in which the struggle may be greater. Far more serious is the scope of danger here than the strong probability that the appellant's act will occasion a breach of the peace within our own borders. Constitutional guarantees require limitations which will narrow this compass of danger. A Nation cannot hope to survive if those who serve it in conflict, in foreign lands, become subjected to agonizing demoralizations arising at home by contempt for those ingrained ideals, spiritual or physical, which spur them on to obeisance and loyalty. And whether a cause of conflict is just or not, it is the electorate, in the final analysis, who will receive the greater punishment as morale is lowered. Until conflict ends, victory must be its goal, and safety for the soldier, which poor morale impedes, must be kept at its highest level.

Nor is the elevation of morale devoutly to be sought only for those who serve in conflict. Whether the time is one of

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[43] There appears to be a more instinctive feeling of respect for the flag than for a draft card, since it begins to make a strong impression upon us earlier in life. Again, a draft card is physically the personal property of the registrant and its destruction, ordinarily, would not affect us, as much as does the desecration of the flag of the United States which belong to the citizenry at large.

peace or conflict, any act of flag desecration tends to lower the very pride of the citizen in his Country, and the lessening of such pride proportionately increases as the impression made by the act of desecration becomes stronger when like acts go unpunished. This is another reason for not condoning flag desecration.

It is significant that in *Beauharnais* v. *Illinois,* 343 US 250, 72 S. Ct. 725 (1952), *supra,* Mr. Justice Frankfurter, in a majority opinion, in effect upheld the dignity of the person by enforcing an Illinois group libel statute enacted to shield a segment of our society from malignment, at the same time recognizing the existence of serious racial problems in our Country. (*Id.* at 258-61, 72 S. Ct. at 731-33.) Preserving the respect for the flag, as well as for the dignity of the person, are the desirable goals of a democratic society, for one cannot exist without the other.

It would be ironic indeed to maintain that we have a duty to punish those who "bring into public odium any foreign government . . . or bring into public disrepute its political, social, or economic acts or views" (see *Frend* v. *United States,* 100 F. 2d 691, 692 [D.C. Cir. 1938]), without conceding that we have the correlative obligation of similarly punishing those whose acts are also as offensive to us, particularly when the act complained of is the burning of our cherished flag. (See N.Y. Times, April 11, 1967, p. 8, col. 1), wherein it was reported that oral protest was presented by Robert H. McBride, the United States Embassy Minister, to Jacques de Beaumarchais, director of Political Affairs at the Foreign Ministry, for the flag-burning incident in Paris on April 7, 1967.)

In fine, we must protect our Country at all times. The anticipation of an attempt to overthrow our basic tenets of democracy by arrogant behavior designed to flout our institutions, and flag burning is such an attempt, must be our prime concern. We cannot afford to experiment by permitting all acts and words denigrating our basic philosophies to freely reach the marketplace of ideas. The vitality of such a view was inherent in the determination of *Dennis* v. *United States,* 341 U.S. 494 (1951), *supra* at 509-10, 71 S. Ct. at 867, when it was succinctly stated:

> "We must reject . . . the contention that success or probability of success [to overthrow the Government] is the criterion." (Vinson, Ch. J.)

In another landmark case, this Court declared:

> "[T]he immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration; . . . it may in the exercise of its judgment, suppress the threatened danger in its incipiency." (*Gitlow* v. *New York,* 268 U.S. 652, 669, 45 S. Ct. 625, 631 [1923], *supra,* [Sanford, J.].)

To paraphrase *Gitlow, supra,* are we required to wait for an epidemic to break out before the doctor is summoned?

The appellant's right as a citizen to criticize his Country and to effectively participate in public affairs is not denied him by the fact that Sec. 1425, subd. 16, para. d, of the Penal Law of the State of New York, *supra,* also bars the use of "words" as well as "act" in the interdicted conduct affecting the flag of the United States. The use of "words" which "defile or defy . . . or cast contempt" upon the flag "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is greatly outweighed by the social interest in order and morality." (See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769 [1942]; CHAFEE, FREEDOM OF SPEECH 170 [1920].)

As has already been shown in Argument A *supra,* the statute, being narrowly drawn, does not violate any constitutional mandates regarding the right to enjoy freedom of speech. And if there be any doubt as to the constitutional propriety of including "words" within the prohibition of the statute, which we do not anticipate (for the reasons already presented, and especially when we note the rebellious nature of the words employed herein simultaneously with the act performed), that doubt can easily be resolved by excising that language and leaving inviolate the punishment of the act of which the appellant was accused, except insofar as the language employed spelled out the "contempt" displayed by him.

As succinctly stated by Judge Cardozo in *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 N.Y. 48, 129 N.E. 202 (1920):

> "In this state, we have gone far in sub-dividing statutes, and sustaining them so far as valid (*Dollar Co.* v. *Canadian C. & F. Co.,* 220 N.Y. 270, 278, and

cases there cited; *People* v. *Beakes Dairy Co.*, 222 N.Y. 416, 432; *People ex rel. Penn. Gas Co.* v. *Saxe*, 229 N.Y. 446). The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment (*Loeb* v. *Columbia Township Trustees, supra,* (179 U.S. 472, 490). The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots. (*Id.* at 60, 129 N.E. at 207).

* * * * *

"Laws are not to be sacrificed by the courts on the assumption that legislation is the play of whim and fancy. . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. *When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment* [citing case].". (*Id.* at 62-63, 129 N.E. at 207-08.) (Emphasis supplied.)

See also, *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241-242, 49 S. Ct. 115, 117 (1929).

To extirpate the language "words" from the statute would not avert further desecrations, but may encourage other abuses, written or spoken. The "statutory rule" will function much better "if the knife is [not] laid to the branch

[or] the roots." Courts, wherever possible, seek to save statutes.

See generally, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439, 55 S. Ct. 241, 256 (1935), *supra*, (Cardozo, J. dissenting); *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 659 (1916).

Although the Court of Appeals of the State of New York predicated its determination upon the view that the statutory purpose of the statute was to "prevent the outbreak of . . . violence by discouraging contemptuous and insulting treatment of the flag in public" *People* v. *Street*, 20 N.Y. 2d 231, 236, 229 N.E. 2d 187 [1967], *supra*, appellant's Appendix 8a), and as was emphasized in *People ex rel. McPike* v. *Van De Carr*, 91 App. Div. 20, 26 (1st Dept. 1904), *aff'd*, 178 N.Y. 425 (1904), *supra*,[44] it was our position at the time of argument in the Court of Appeals, and to which we respectfully still adhere, that what is *also* apparent is that the contemptuous treatment of the flag of the United States of America,[45] which would shock the conscience of any true American, nay, of any decent person, is serious enough, per se, to be treated as a criminal act and punishable if committed "publicly."

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[44] See also, *Halter* v. *Nebraska*, 205 U.S. 34, 41, 27 S. Ct. 419, 421 (1906), *supra*. *But see People* v. *Picking*, — Misc. —, 23 N Y S 2d 148, 149 (N.Y.C. Mag. Ct. 1940), *aff'd*, 263 App. Div. 366 (1st Dept. 1942), *aff'd*, 288 N.Y. 644 (1942), *cert. denied*, 317 U.S. 632 (1942), *supra*, where the court indicated that the aim of the statute was to "hold up the dignity of the American Flag . . ."

[45] It appears obvious that for the purposes of the statute herein involved, any asserted claim of "title" to the flag by a defendant would be meaningless. The flag, as such, like money, is the unique property of the United States of America and its citizens as a whole, except that the proper use of it by individuals is encouraged. The material ownership of the flag, although in the appellant, must yield to the stronger spiritual right to it as vested in our land and its citizens.

It is the public display of such ignominious conduct which accentuates the danger of the act, not only from a "breach-of-the-peace" sense, but from the ineffaceable debasing effect, however slight, such desecration may have upon another's respect for the symbol of our cherished liberties, if what is thus seen goes unpunished.

What can be gained by abusing our flag under the guise of unfettered expression? Certainly, the harm that will result greatly outweighs the need for constitutional protection that is sought for such expression. An act of contempt done in public, as in this case, is condemnable because it maligns our flag in the eyes of others, and detracts from the respect one would ordinarily show for the flag if he were not "treated" to such a spectacle. It may even encourage others to perform similar, or as equally unforgiveable, acts against the flag of our Nation. Thus, in order to preserve the sanctity of the flag, the Legislature of the State of New York[46] wisely provided that an act such as committed by the appellant herein would suffer punishment if done "publicly."

It is noteworthy that Sec. 1425, subd. 16, para, d, of the Penal Law of the State of New York, *supra,* sets forth conduct violative of Article 134, which has for its sole purpose the prohibition of various forms of conduct, specified in detail, and described as "Malicious Mischief." All of this has been superseded by L. 1965, c. 1031, sec. 52, eff. Sept. 1, 1967, and further identified as Section 136 of the General Business Law of the State of New York. This would indicate an *additional* legislative purpose to pro-

[46] See 51 N.Y. State Dept. Rep. 240 (1934), and 1941 N.Y. Att'y Gen. Rep. 465, *supra* at 59.

tect the flag from public desecration dehors any desire to prevent a breach of the peace. Otherwise, many acts of desecration would escape punishment because of the difficulty in showing that a breach of the peace occurred, or might have been occasioned (*i.e.*, when the flag is used for advertising purposes).[47] The proscription, therefore, appears to be two-pronged—to condemn the disrespect of a needed and worthy symbol, as well as to avert an imminent breach of the peace.

It is interesting to note that "contempt" is also defined as follows:

> "4a: wilful disobedience to or *open* disrespect of the valid rules, orders, or process or the dignity or authority of a court or a judge acting in a judicial capacity . . . " (Webster's New Int. Dictionary [3rd ed. 1964] [emphasis supplied].)

Thus, "open," which is synonymous with "public," when considered in the light of the above definition of "contempt," lends some significance to the view that punishment in the instant case is mandated, not only for a "breach of the peace," or its likelihood, but, also, for the act of disrespect, in and of itself. The contempt of the type shown in the above dictionary meaning does not need to rest upon any consideration of "breach of the peace," since what is punished is the degrading of, or casting disrespect upon, a court and judge in the presence of others who comprise the "public." And so it is with the instant statute; it is the contumelious conduct toward the flag of the United States in the presence of others which we seek to reproach so that a symbol of our liberties is not relegated to a state of opprobrium.

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[47] Also, where one desecrates a flag in public with no audience other than a group of very young children with impressionable minds, who could not plausibly ever become involved in a breach of the peace by what they saw or heard.

It must not be overlooked that there was a strong probability indeed that the appellant's act could easily have resulted in a breach of the peace. A war veteran, for example, would not be likely to be insensible to the sight of the appellant's desecration of the flag.

Had not the police officer chanced to be nearby, there existed a grave possibility that the impact of the appellant's conduct might have penetrated the recesses of the minds of some of those passersby in that socially and economically disadvantaged area, and thus incited violent action favoring the appellant's act. Such an occurrence is not too remote when we consider the various disturbances throughout the Country in recent times. That it did not happen, though fortunate, is of no import, for, to reiterate, there was a strong likelihood of it,[48] and in any event, the appellant's "contempt" for the flag "publicly," warrants punishment under the statute.

Appropriate, indeed, is the language of Mr. Justice Douglas who, in recognizing that conditions may affect behavior, stated in *Dennis* v. *United States*, 341 U.S. 494, 71 S. Ct. 857 (1951), *supra*:

> "In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents." (*Id.* at 588, 71 S. Ct. at 906, dissenting opinion.)

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[48] The substantive evil of a breach of the public peace was imminent from the appellant's conduct, and from the very nature of flag desecration, the "imminence" need not be expressly set forth in the statute. The appellant's acquittal on the charge of Disorderly Conduct does not inure to his benefit. He was convicted of violating the statute covering Malicious Mischief because his act was specifically prohibited by it. The "imminence" of danger is inherent in the insult, although "likelihood" is the least the statute requires.

The appellant's conduct becomes a pattern for others with hidden anger for our Nation.

Terminiello v. *Chicago*, 337 U.S. 1, 69 S. Ct. 894 (1948), upon which the appellant relies, was one in which actual expression was involved. The State wishes to emphasize again that the appellant's act was not one to which symbolic quality can be attached. Further, in *Terminiello*, as distinguished from *Feiner* v. *New York*, 340 U.S. 315, 71 S. Ct. 303 (1951), the defendant had been convicted for causing a breach of the peace by delivering a speech indoors which stirred outside public to anger. A function of free speech is to invite dispute. *Feiner*, on the other hand, had suffered the penalty of the law for creating the clear danger of public disorder while delivering insults on the street.

Pedestrians assume many risks, such as the noises of vehicular traffic, physical contacts with other people or vehicles, and so forth. Nevertheless, they are entitled to be spared from onslaughts upon their sensibilities when one publicly casts contempt upon our flag. While insults to one's origin, as in *Terminiello, supra*, leaves for the offended the consolation that Democracy is the salvation, the other deteriorates the very concept which creates our pride in citizenry. Ordinary events which we encounter during the course of a day are easily forgotten, but the sight of an American flag being scornfully set on fire is bound to have a traumatic effect on the decent person who chances to be present at the time. One should not be made a "captive" of such events. (Compare *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469, 72 S. Ct. 813, 824 [1952] [Douglas, J., dissenting].)

In concluding, it is respectfully prayed that no constitutional guarantee be permitted to shield the appellant's act

from punishment, and whether this Court shall, or shall not, attach the quality of symbolic expression to the burning of the flag of the United States, it is, nevertheless, so patently offensive to, and "sacrilegious" of, the deep traditional feelings of the American and the very spirit of this Country's history, that it would be unthinkable to shelter such conduct under the protective mantle of our treasured Constitution with which the flag is inseparably fused. To do that, would make constitutional guarantees the very means of self-annihilation!

> "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." (*Terminiello* v. *Chicago*, 337 U.S. 1 [1948], *supra* at 37, 69 S. Ct. at 911 [Jackson, J., dissenting].)

It is respectfully prayed, therefore, that the desecration of the American flag again leaves for this Honorable Court the wisdom of determining that the choice must be "liberty with order," rather than "anarchy without either."

CONCLUSION

The judgment and decision of the New York Court of Appeals in this case below should be affirmed.

Dated: Brooklyn, New York
September, 1968

Respectfully submitted,

ELLIOTT GOLDEN
Acting District Attorney
Kings County
Office & P.O. Address
Municipal Building
Brooklyn, N.Y. 11201
Attorney for Appellees

HARRY BRODBAR
Assistant District Attorney
Of Counsel

Appendix A-1, A-2

PHOTOPRINT

(Mounted opposite)

APPENDIX A-1

RICHARD J. BARTLETT, CHAIRMAN
TIMOTHY N. PFEIFFER, VICE CHAIRMAN
CHARLES B. RANGEL, SECRETARY
BENJAMIN ALTMAN
HYMAN BARSHAY
EARL W. BRYDGES, JR.
JOHN J. CONWAY, JR.
JOHN R. DUNNE
FRANK S. HOGAN
HOWARD A. JONES
WHITMAN KNAPP
ARCHIBALD R. MURRAY
EDWARD A. PANZARELLA
BERNARD C. SMITH
HERBERT WECHSLER

STATE OF NEW YORK
TEMPORARY COMMISSION ON REVISION
OF THE
PENAL LAW AND CRIMINAL CODE

ROOM 884
155 LEONARD STREET
NEW YORK, N. Y. 10013

CO 7-1708

RICHARD G. DENZER
EXECUTIVE DIRECTOR

PETER J. McQUILLAN
COUNSEL

August 15, 1968

Harry Brodbar
Assistant District Attorney
Kings County
Municipal Building
Brooklyn, New York 11201

Dear Mr. Brodbar:

I have your letter of August 5, 1968 addressed to Richard Bartlett, Esq., the Chairman of this Commission, concerning your flag-desecration case (Street v. New York) now pending in the Supreme Court of the United States.

The former Penal Law section dealing with this subject contains a number of other provisions of a commercial nature (e.g., using the flag for advertising purposes). The criminal provision with which you are concerned was sandwiched in between others of the sort I have just described. By and large, therefore, the section in question was not primarily of a penal nature and, in our view, belonged in the General Business Law rather than in the Penal Law. It was mainly for this reason that such transfer was effected.

At the time of the passage of our large transfer bill, which relocated hundreds of sections in other bodies of law, flag burning was not a cause celebre and it seemed of little moment whether the flag desecration portion of the statute were to be found in the Penal Law or the General Business Law. If the transfer bill had been submitted in 1967 rather than in 1968, we probably would have left that provision in the Penal Law. The fact of the

APPENDIX A-2

transfer, however, is of no legal significance so far as I can see. A vast portion of the criminal statutes of New York State are found in bodies of law other than the Penal Law and they are no less crimes for that reason. Accordingly, I can discern no persuasive legal argument that can be made on the basis of the transfer in question.

Sincerely,

RGD:HEG

Richard G. Denzer
Executive Director

Appendix B-1, B-2

Photoprint

(Mounted opposite)

PROPERTY CLERK'S INVOICE

Pr. Cl. 1 (Rev. 10-62)

APPENDIX B-1

THE CITY OF NEW YORK

POLICE DEPARTMENT

THIS PROPERTY IS:

☒ Required as EVIDENCE ☐ *DECEDENT'S PROPERTY ☐ FOUND PROPERTY ☐ OTHER

(See instructions on reverse side)

Officer Assigned — Date: June 6, 19 66

Prisoner's Name — Rank — Shield No. — Command

Address

Date of Arrest — Arrest No. — Charge

Finder of Property — Address — U.F. 61 No.

Claimant's Name — Address — Apt. No.

ITEM NO.	QUANTITY	ARTICLE	**CASH VALUE U.S. Currency only	(For Property Clerk's Use Only) DISPOSITION and DATE
	1	Misc. Fragments of U.S. Flag		

REQUEST FOR FINAL DISPOSITION

I acknowledge having received the above articles which will be invoiced to the Property Clerk.

Rank — Signature of Desk Officer — Shield No.

LOCATION WHERE PROPERTY STORED: MISC

The articles listed hereon were received and verified by:

Rank — Signature — Shield No.

PRECINCT — VOUCHER NO. — YEAR

88 — 805 — 1966

PROPERTY CLERK'S VOUCHER NO.

[over]

REMARKS:

APPENDIX B-2

RECEIVED

'66 JUN 13 PM 1:10

PROPERTY CLERK'S
OFFICE BROOKLYN

INSTRUCTIONS:

1. Property coming into the custody of this department (except motor vehicles) shall be promptly invoiced on this form, which shall be typewritten in quadruplicate (2 white, 1 buff, 1 green), and forwarded with the property to the Property Clerk's office. The green copy shall be receipted by the Property Clerk and returned to the originating command for file. An additional green copy shall be prepared and forwarded to the Property Clerk with narcotics and decedent's property.
2. Separate vouchers shall be prepared for: a) prisoner's personal property; b) firearms; and c) narcotics.
3. If there is more than one prisoner, finder or claimant involved, enter the additional names and addresses under "Remarks". If owner or claimant is a corporation, give the corporate name, not the name of an individual connected with it.
4. U.S. currency shall be entered first, then foreign money, jewelry, etc. Each denomination of currency (bills and coins) shall be given an item number. The serial number of each bill shall be listed. Under "Cash Value", the total amount for each denomination of U.S. currency shall be entered.

**5. The estimated value of the property shall be entered under "Cash Value" ONLY when the property is returned to a claimant at the station house. The claimant's name and address and time and date of return of property shall be entered under "Remarks".

6. Security lead seals shall be used where appropriate and the seal number shall be entered alongside the description of the article. Not more than five articles shall be placed on one seal.
7. When invoicing found property, a transcript of the blotter entry concerning its finding shall be entered under "Remarks".

*8. When invoicing decedent's property, name and address of deceased and related aided case number shall be entered under "Remarks".

Appendix C

"What So Proudly We Hailed . . .
An American flag burns in the Sheep Meadow of Central Park, and not by accident, as peace marchers warm to the task of marching to the UN in protest of the war in Vietnam. A crowd estimated at 125,000—far short of the predicted 400-500,000 demonstrators—marched through midtown for the "Spring Mobilization Against the War in Vietnam." Despite the inflammatory nature of the occasion, almost 3,000 cops kept the peace." Courtesy of The News, New York's Picture Newspaper, Sunday, April 16, 1967, final ed. p. 120.

Photograph

(Mounted opposite)

New York Daily News
April 16, 1967
depicting flag-burning
incident in Central Park,
New York City-April 15, 1967.

APPENDIX C

Appendix D

PHOTOGRAPH

(Mounted opposite)

New York Times, April 8, 1967, p. 1

Associated Press Cablephoto

In the Place d'Iéna, near Arc de Triomphe, where Mr. Humphrey placed a wreath at the Tomb of the Unknown Soldier, peace demonstrators burn American flag. Thursday was the 50th anniversary of U.S. entry into World War I.

Appendix E

PHOTOPRINT

(Mounted opposite)

APPENDIX E

THE NEWS
NEW YORK'S PICTURE NEWSPAPER
220 EAST FORTY SECOND STREET
NEW YORK, N.Y. 10017
MURRAY HILL 2-1234

J. HAROLD FORBES, JR.
EDITORIAL PROMOTION MANAGER

September 12, 1968

Mr. Harry Brodbar
Assistant District Attorney
Appeals Bureau
Municipal Building
Brooklyn, New York 11201

Dear Mr. Brodbar:

I am setting forth below the information about the flag sales which you requested in your letter of June 21, 1968, addressed to the Editor. The total number of sales, as of September 10, 1968, is:

	WENT ON SALE	PRICE COUNTER	PRICE MAIL	SALES COUNTER	SALES MAIL	TOTAL SALES
Window Flags	10/1/67	$1.00	$1.35	55,156	56,389	111,545
Flag Decals	12/6/67	.05	.05	325,362	37,852	363,214
U.S. Flag Kits	4/19/68	3.00	3.50	14,751	15,910	30,661
						505,420

I'll be very glad to bring you up-to-date any time in the future. Just let me know.

Sincerely yours,

J. Harold Forbes Jr.